No. 90-5358-CFY
Status: GRANTED

Title: Thomas Braxton, Petitioner
v.
United States

Docketed:
August 3, 1990

Court: United States Court of Appeals
for the Fourth Circuit

Counsel for petitioner: Cribari,Stephen J.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Aug 3 1990	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Sep 6 1990		Order extending time to file response to petition until October 5, 1990.
5	Oct 11 1990		Brief of respondent United States in opposition filed.
6	Oct 25 1990		DISTRIBUTED. November 9, 1990
7	Oct 31 1990	X	Reply brief of petitioner Thomas Braxton filed.
9	Nov 13 1990		Petition GRANTED.
			**********
10	Dec 12 1990		Joint appendix filed.
11	Dec 27 1990		Brief of petitioner Thomas Braxton filed.
12	Jan 3 1991		Record filed.
		*	one vol.-USAP 4.
13	Jan 28 1991		Brief of respondent United States filed.
14	Feb 1 1991		SET FOR ARGUMENT MONDAY, MARCH 18, 1991. (1ST CASE).
15	Feb 6 1991		CIRCULATED.
16	Feb 25 1991	X	Reply brief of petitioner Thomas Braxton filed.
17	Mar 18 1991		ARGUED.

EDITOR'S NOTE —

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ORIGINAL

No. 90-5358

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THOMAS BRAXTON,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether "a stipulation that specifically establishes a more serious offense than the offense of conviction," according to United States Sentencing Guideline Section 1B1.2(a), can exist in light of the Fourth Circuit's recognition that, in this case, "there was no plea agreement, written or oral, and there was no agreement of the facts designated to be a Stipulation"?

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IN THE
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OCTOBER TERM, 1990

THOMAS BRAXTON,

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v.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner[1], Thomas Braxton, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on May 8, 1990.

OPINION BELOW

On May 8, 1990, a divided panel of the United States Court of Appeals for the Fourth Circuit affirmed the decision of the United States District Court for the District of Maryland which imposed an

[1] All the parties to this proceeding and to the proceedings below appear in the caption of this case.

enhanced sentence on Mr. Braxton under Section 1B1.2(a) [relevant conduct] of the United States Sentencing Guidelines[2] (hereinafter referred to as "U.S.S.G."), even though the district court had found that the requirements of that guideline had not been satisfied. United States v. Braxton, 903 F.2d 292 (4th Cir. 1990); App. 1.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). See Supreme Court Rule 10.1(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "No person shall be * * * deprived of life, liberty, or property, without due process of law * * *."

U.S.S.G. Section 1B1.2(a) instructs, in pertinent part:

> Determine the offense guideline section in Chapter Two (Offense Conduct) most applicable to the offense of conviction (i.e., the offense conduct charged in the count of the indictment * * * of which the defendant was convicted). Provided, however, in the case of conviction by a plea of guilty * * * containing a stipulation that specifically establishes a more serious offense than the offense of conviction,

[2] Enacted under the Sentencing Reform Act of 1984, Pub. L. 98-473 § 235, 98 Stat. 1988, October 12, 1984 (Comprehensive Crime Control Act of 1984, Chapter II)(as amended)(savings clause effective date), reprinted at 18 U.S.C. § 3551 (West 1985 and Supp. 1989). See 18 U.S.C. Sections 3551 et seq. and 28 U.S.C. Sections 991 et seq.

determine the offense guideline section in Chapter Two most applicable to the stipulated offense.

STATEMENT OF THE CASE

In 1974, Thomas Braxton was acquitted of bank robbery by reason of his insanity. Since that time he has been committed to St. Elizabeths Hospital in Washington, D.C., where he remains a patient. He has been (and is now) confined to the John Howard Pavilion for the Criminally Insane. In the past he has been conditionally released to the community. During a conditional release in 1988, he stopped reporting for his medication and the United States Marshals Service was dispatched to return him to St. Elizabeths Hospital. Mr. Braxton resisted apprehension by refusing to leave his apartment, by orally threatening the marshals, and by discharging a handgun through the door when it was kicked open by the marshals. Ultimately he was subdued and returned to the hospital. No one was injured except Mr. Braxton.

In August, 1988, Mr. Braxton pleaded not guilty to a three count indictment charging him with attempted murder of deputy United States Marshals, assault on federal officers, and use of a firearm during a crime of violence, in violation of 18 U.S.C. Sections 114, 111, 924(c), and 2. Despite Mr. Braxton's continuing confinement for insanity, he was unable to present an insanity defense to these charges because the federal insanity defense had been redefined by the Comprehensive Crime Control Act of 1984. 18 U.S.C. Section 17 (1990).

In May, 1989, Mr. Braxton entered pleas of guilty to the assault and handgun charges but persisted in his not guilty plea to attempted murder. He did not enter into a written plea agreement with the United States in order to avoid entering into a factual stipulation proposed by the government that would have set forth facts establishing the offense of attempted murder. However, Mr. Braxton admitted that he

> did shoot at the Marshals when my door was kicked in, but I was not trying to kill the Marshals, harm the Marshals. I was - it was all happening in such a fast instant that the only thing I could think of doing was defending my home and trying to keep them from taking me back to St. Elizabeth's.

Braxton, 903 F.2d at 297. The attempted murder charge was dismissed by the government at sentencing.

Because this case arose after November 1, 1987, sentencing was governed by the Sentencing Guidelines.

In July, 1989, Mr. Braxton was sentenced to a period of imprisonment of sixty-three months for the assault charge, and to a mandatory consecutive five year term of imprisonment for the handgun violation (a sentence which Mr. Braxton has never challenged) for a total period of imprisonment of ten years and three months. The assault sentence represents the high end of a 51-63 month range at base offense level 23 and a criminal history category II. The calculation was based not on a base offense level 15 for assault on federal officers (Mr. Braxton's offense of conviction) but rather on a base offense level 20 because the trial

court decided that the "facts added up," to attempted murder (the offense to which he had not entered a plea of guilty). Braxton, 903 F.2d at 298. Had the calculation been based on the lower base offense level of 15, the resulting sentencing range (after the calculation of other adjustments) would have been 30-37 months and not 51-63 months.

Mr. Braxton then appealed to the United States Court of Appeals for the Fourth Circuit, under the provisions of 18 U.S.C. Section 3742(a). That court reversed in part the district court's judgment and remanded for resentencing.[3] On July 26, 1990, Mr. Braxton was resentenced to a term of 51 months for the assault. This term represents the high end of a 41-51 month range at base offense level 21 and criminal history category II. His sentence for the handgun violation remained unchanged, making a total period of imprisonment of nine years and three months. Had the district court correctly calculated the base offense level, the sentencing range on remand would have been 24-30 months (base offense level 16/criminal history category II) as opposed to the original 51-63 month range (base offense level 23/criminal history category II).

This Petition challenges only the Fourth Circuit's conclusion

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[3] The district court found that, because of his mental illness, Mr. Braxton was incapable of showing remorse for assaulting the deputy U.S. Marshals. The district court also concluded that remorse was the first step toward rehabilitation and rehabilitation was a necessary predicate for a sentencing adjustment under U.S.S.G. § 3E1.1 [acceptance of responsibility], and denied the two-level downward adjustment possible under this Guideline. The Fourth Circuit ruled that the district court erred when it made rehabilitation a condition precedent to an acceptance of responsibility reduction.

that even in the absence of a plea agreement containing a written stipulation, a defendant's acknowledgment of the government's statement of facts proffered in connection with a guilty plea

> can be interpreted as a stipulation for the purposes of establishing a more serious offense than the offense of conviction under § 1B1.2(a).

Braxton, 903 F.2d at 297.

REASONS FOR GRANTING CERTIORARI

THE FOURTH CIRCUIT'S DECISION IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS, WITH GUIDELINES COMMENTARY, AND WITH THE LANGUAGE OF THE GUIDELINE WHICH IT PURPORTS TO CONSTRUE

The wording of Section 1B1.2(a) itself indicates that only a guilty plea "containing a stipulation that specifically establishes a more serious offense than the offense of conviction" can be used as a basis for calculating a base offense level greater than the base offense level for the offense of conviction. See, e.g., United States v. Martin, 893 F.2d 73 (5th Cir. 1990)(where resentencing was ordered after a government appeal because stipulated facts reflecting a more serious offense than that of conviction were contained in a factual stipulation accompanying a plea agreement).

Nevertheless, the Fourth Circuit majority reasoned:

> Although § 1B1.2 uses the word "stipulation" and the district judge stated that there was "no stipulation to attempted murder," we are persuaded that "stipulation" in § 1B1.2 is not used in a restrictive way so that only an agreement designated as a "stipulation" would comply with the guideline. As used in this

> section "stipulation" means an agreement as to the facts that specifically establishes a more serious offense than the offense of conviction. There is no requirement in the guidelines or in the commentary or application notes that this stipulation must be in writing. It is only necessary that the facts presented to the court establish a more serious crime and that the defendant agree to the statement of facts.

903 F.2d at 298. This opinion conflicts with case law, Guidelines commentary, and common sense.

The stipulation envisioned by U.S.S.G. Section 1B1.2(a) is a formal stipulation and "will generally be in the context of plea agreements." United States v. Strong, 891 F.2d 82, 85 (5th Cir. 1989). Judge William Wilkins of the Fourth Circuit and Chairman of the Sentencing Commission has recently commented on this issue:

> It is not enough that the defendant simply admit at sentencing to more serious criminal activity than the charged offense proscribes; rather, a negotiated quid pro quo as part of a plea of guilty or nolo contendere is contemplated. In such a case, the Government agrees to forego prosecution of a more serious charge in exchange for gaining application of the guideline applicable to the more serious charge. The defendant agrees to the use of that guideline in exchange for limiting his statutory exposure and, perhaps, avoiding other guideline and statutory consequences.

Wilkins, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 South Carolina L. Rev. 495, 501 (1990) [hereinafter referred to as "Relevant Conduct"] (citing United States v. Guerrero, 863 F.2d 245, 248 (2d Cir. 1988)("facts admitted by the defendant to shorten or obviate a sentencing hearing do not establish a 'stipulated offense' within the meaning of section 1B1.2(a)"); United States v. Garza, 884 F.2d 181, 183-84

(5th Cir. 1989)(where a defendant stipulated to the facts of a more serious offense "as part of a plea agreement"); Martin, 893 F.2d 73; and Strong, 891 F.2d 82). Although the government dismissed the attempted murder charge in Mr. Braxton's case, "there was no agreement that this would be done." Braxton, 903 F.2d at 297. Mr. Braxton did not "agree to the use of (the greater) guideline in exchange for limiting his statutory exposure." Wilkins, Relevant Conduct, 41 South Carolina L. Rev. at 501. The Fourth Circuit recognized that "there was no plea agreement, written or oral, and there was no agreement of the facts designated to be a Stipulation * * *." Id. at 297.[4] The trial court's use of Section 1B1.2(a) is startling because the court unequivocally noted the absence of any Section 1B1.2(a) relevant conduct stipulation:

> [Your lawyer]'s made it absolutely clear throughout that, Mr. Braxton, on your behalf, there has been no stipulation to Attempted Murder and the record's clear on that.

Braxton, 903 F.2d at 298. The trial court used the higher base offense level because it felt the facts indicated Mr. Braxton was guilty of attempted murder. Although the trial court indicated it would depart to impose the attempted murder sentence, the Fourth Circuit ruled that the sentence was appropriate under Section 1B1.2. It did not address whether the sentence would have been proper under some theory of departure. Id. at 298-99.

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[4] These facts, among others, found by the district court at sentencing are subject to a clearly erroneous standard of review, United States v. Daughtrey, 874 F.2d 213 (4th Cir. 1989). The Fourth Circuit concluded that these findings were not clearly erroneous. Braxton, 903 F.2d at 297.

Because there was no agreement containing a stipulation to more serious facts than those of the offense of conviction, the trial court should have begun its Guidelines calculation at a base offense level 15 rather than a base offense level 20.

In contrast, the dissenting opinion in Braxton follows the case law developed in the Second and Fifth Circuits and urged by the Chairman of the Sentencing Commission. The dissent noted that a "'stipulation' as it is used in section 1B1.2(a) at least means an agreement between a defendant and the government." Id. at 299. Mr. Braxton did not have any agreement with the government.

The dissent is also consistent with the language of the Guideline itself (which must be construed restrictively and not expansively, see, e.g., U.S.S.G. Section 1B1.7 [Significance of Commentary]), and more appropriately defers to the facts as found by the district court.

The majority's conclusion that a defendant's agreement to the facts presented by the government at a guilty plea "qualifies as a stipulation under § 1B1.2," Id. at 298, must be reviewed by this Court. It is in conflict with the opinions of other circuits, the commentary of the Sentencing Commission Chairman, and the language of the guideline it attempts to construe. It is a denial of due process on the facts of this case, and is unfortunate as a matter of principle. A stipulation is not merely an acknowledgment of the factual underpinnings of a guilty plea. It is a specific written

document signed by all of the parties including the defendant.[5]

To leave this case unreviewed is to let stand a decision that would render the plea bargaining process nonsensical. It would allow sentences to be calculated on dismissed charges even though a defendant does not stipulate to the conduct which was the subject of the dismissed charge. This is not what Section 1B1.2 intends. Strong, 891 F.2d at 85 ("The drafters clearly did intend to draw a distinction between the class of defendants who plead guilty or no contest and file a stipulation of facts establishing commission of a more serious offense, and the class of defendants who do not. That distinction is unambigiously drawn in the language of the rule"). The Fourth Circuit's decision in Braxton ignores this distinction and is in conflict with decisions of the Second and Fifth Circuits.

---

[5] It was noted in the lower court briefs that it is routine practice before the U.S. District Court for the District of Maryland for written plea agreements to contain written stipulations of fact as well as stipulations as to sentencing guidelines factors, and are signed by all counsel and the defendant. It is significant that Mr. Braxton chose not to enter a plea agreement of any kind let alone a written one, so as not to appear to enter a factual stipulation regarding offense conduct.

CONCLUSION

This Court should issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit so that this Court may resolve the split among the circuits and the deviation from case law created by the Fourth Circuit's decision.

Respectfully submitted,

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August 3, 1990

APPENDIX

United States v. Braxton, 903 F.2d 292 (4th Cir. 1990).....App. 1

Judgment of the U.S. District Court for the District of Maryland including Sentence under The Sentencing Reform Act, July 21, 1989.....App. 9

offense level was warranted as victims were law enforcement officers.

Affirmed in part, reversed in part, and remanded.

Sprouse, Circuit Judge, concurred in part and dissented in part and filed opinion.

1. Criminal Law ⇐1252

Rehabilitation is not a factor in considering whether to reduce defendant's base offense level under sentencing guidelines for acceptance of responsibility. U.S.S.G. § 3E1.1, 18 U.S.C.A.App.

2. Criminal Law ⇐1241

Word "stipulation" as used in sentencing guideline relating to determination of offense guideline section includes defendant's oral agreement or acceptance on the record of government's presentation to court of facts establishing offense that is more serious than offense of conviction. U.S.S.G. § 1B1.2, 18 U.S.C.A.App.

See publication Words and Phrases for other judicial constructions and definitions.

3. Criminal Law ⇐1241

Defendant's agreement to proffer of facts by government, in which defendant admitted that he fired two shots through doorway of his apartment at United States marshals, that he said he would kill them if they came in, and that he threatened to kill any additional support personnel called to the scene if they attempted to come in, qualified as "stipulation" under sentencing guideline providing for determination of offense guidelines section and supported district court's finding of attempted murder. U.S.S.G. § 1B1.2, 18 U.S.C.A.App.

4. Criminal Law ⇐1246

Three-point increase in base offense level for attempted murder was supported by evidence that victims were law enforcement officers. U.S.S.G. § 3A1.2, 18 U.S.C.A.App.

Stephen Jon Cribari, Deputy Federal Defender, Baltimore, Md., for defendant-appellant.

UNITED STATES of America, Plaintiff-Appellee,

v.

Thomas BRAXTON, Defendant-Appellant.

No. 89-5651.

United States Court of Appeals, Fourth Circuit.

Argued Feb. 8, 1990.

Decided May 8, 1990.

Defendant pled guilty to assault on a federal officer and use of firearm during crime of violence. In sentencing defendant, the United States District Court for the District of Maryland at Baltimore, J. Frederick Motz, J., denied two-level reduction for acceptance of responsibility and used enhanced base level. Defendant appealed. The Court of Appeals, Chapman, Circuit Judge, held that: (1) trial court erred in finding that rehabilitation was necessary element in its consideration of defendant's request for reduction, (2) defendant's agreement to proffer of facts by government qualified as stipulation, and those facts supported finding of attempted murder; and (3) three-level increase in base

Susan Moss Ringler, Asst. U.S. Atty., Baltimore, Md., for plaintiff-appellee.

Fred Warren Bennett, Federal Public Defender, Baltimore, Md., on the brief, for defendant-appellant.

Breckinridge L. Willcox, U.S. Atty., Baltimore, Md., on the brief, for plaintiff-appellee.

Before SPROUSE and CHAPMAN, Circuit Judges, and WARD, Senior United States District Judge for the Middle District of North Carolina, sitting by designation.

CHAPMAN, Circuit Judge:

At sentencing Thomas Braxton was denied a two-level reduction for acceptance of responsibility, because the sentencing judge found that the purpose of acceptance of responsibility was to lead toward rehabilitation, and that because of his mental and emotional condition Braxton could not accept responsibility to the extent necessary to entitle him to the reduction. Appellant claims error because the court found rehabilitation to be a necessary element in its consideration of the request for the reduction. We agree.

Appellant also challenges the district court's use of a base offense level greater than the level applicable to the crimes to which he pled guilty. He claims that it was error to enhance the base offense level in the absence of a stipulation, as provided in § 1B1.2(a), to the more serious crime of attempted murder. We find that the word "stipulation" as used in this section includes a defendant's oral agreement or acceptance on the record of the government's presentation to the court of facts establishing an offense more serious than his offense of conviction.

Therefore, we affirm the district court's use of the enhanced base offense level, but we reverse and remand for resentencing because of the district court's misinterpretation of the law relating to acceptance of responsibility.

I

In September 1974, Thomas Braxton was confined to St. Elizabeth's Hospital in Washington, D.C., pursuant to a United States District Court order, after he had been found not guilty by reason of insanity on a charge of bank robbery. On May 12, 1988, the United States Marshal for the District of Columbia received an arrest warrant charging Braxton with unauthorized leave from the hospital, and on June 9, 1988, the Marshal's Service found that Braxton was living in Mt. Rainier, Maryland. Early on the morning of June 10, 1988, four deputy marshals went to the Maryland address and determined that Braxton was in Apartment 3. They knocked on the door and advised appellant that they had an arrest warrant for him. There was no response although the deputies could hear movement within the apartment. After the deputies knocked again, identified themselves and unlocked the door, appellant fired a .38 caliber revolver through the door opening. None of the deputies was hit and shortly thereafter appellant fired another round through the doorway. Braxton advised the deputies that he was not coming out and was not going back to the hospital. He threatened to kill them if they came into the apartment. Reinforcements were called and tear gas was used to subdue the appellant and arrest him. Braxton stated after arrest that he knew the United States Marshals were knocking on his door, and he fired at them because he did not wish to return to the hospital.

At arraignment, defense counsel requested a continuance for approximately eight months to have the appellant evaluated by a psychiatrist to determine his competency and to evaluate whether an insanity defense could be used. In March 1989, defense counsel advised the court that Braxton was competent to stand trial and that he would not be presenting an insanity defense. In May 1989, without the benefit of a plea agreement, appellant pled guilty to Counts 2 and 3 of the indictment, which charged (2) assault on a federal officer in

olation of 18 U.S.C. § 111, and (3) use of a firearm during a crime of violence in violation of 18 U.S.C. § 924(c). The court conducted the proceeding required by Federal Rule of Criminal Procedure 11 and advised appellant that Count 1, which charged attempt to murder, was still outstanding against him, and as to Counts 2 and 3 he would be sentenced under the sentencing guidelines. After finding that appellant was mentally competent, that he entered the plea voluntarily and without a plea agreement, and that there was a factual basis for the plea, the court accepted the pleas of guilty. The court solicited memoranda from defense counsel and the United States Attorney on the issue of an appropriate sentence. Prior to sentencing, defense counsel filed written objections to the presentence investigation report as it dealt with acceptance of responsibility, victim related adjustments, and the suggested base offense level using the more serious offense of attempted murder.

On July 21, 1989, Braxton was sentenced. Prior to sentencing, all of the pertinent medical records and reports were reviewed by the court. Dr. Neil Blumberg, a psychiatrist who had evaluated appellant at his attorney's request, testified that Braxton was schizophrenic but not insane, and that he should remain in the maximum security inpatient facility at St. Elizabeth's Hospital while serving any sentence. Pursuant to the 1984 Guidelines, Braxton was sentenced to 63 months imprisonment for assaulting a federal officer, to be followed by 60 months incarceration for use of a handgun,[1] and a three-year term of supervised release to commence on release from imprisonment. The government's motion to dismiss Count 1 of the indictment was then granted. During the sentencing, the court denied appellant's request for a two-level reduction for acceptance of responsibility. This denial was based upon the court's finding that due to Braxton's mental illness he could not show remorse for what he had done, and without remorse he could not take the necessary step toward rehabilitation and accept responsibility.

1. This is a mandatory five-year consecutive sentence. 18 U.S.C. § 924(c).

II

Rehabilitation is no longer a purpose for incarcerating a defendant under the federal law. This was made clear when Congress created the United States Sentencing Commission for the purpose of establishing sentencing policies and practices for the Federal Criminal Justice System. At 28 U.S.C. § 994(k), it is stated: "The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of *rehabilitating* the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." (Emphasis added.) In *Mistretta v. United States*, 488 U.S. 361, 109 S.Ct. 647, 652, 102 L.Ed.2d 714 (1989), the Court found:

> The Act, as adopted, revises the old sentencing process in several ways:
>
> 1. It rejects imprisonment as a means of promoting *rehabilitation*, 28 U.S.C. § 994(k), and it states that punishment should serve retributive, educational, deterrent, and incapacitative goals, 18 U.S.C. § 3553(a)(2).

(Emphasis added.)

[1] Acceptance of responsibility is covered in part E of the guidelines and provides:

> § 3E1.1. *Acceptance of Responsibility.*
>
> (a) If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by 2 levels.
>
> (b) A defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea or a finding of guilty by the court or jury or the practical certainty of conviction at trial.
>
> (c) A defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right.

Commentary

Application Notes:

1. In determining whether a defendant qualifies for this provision, appropriate considerations include, but are not limited to, the following:
   (a) voluntary termination or withdrawal from criminal conduct or associations;
   (b) voluntary payment of restitution prior to adjudication of guilt;
   (c) voluntary and truthful admission to authorities of involvement in the offense and related conduct;
   (d) voluntary surrender to authorities promptly after commission of the offense;
   (e) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;
   (f) voluntary resignation from the office or position held during the commission of the offense; and
   (g) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.
2. Conviction by trial does not preclude a defendant from consideration under this section. A defendant may manifest sincere contrition even if he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (*e.g.*, to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct).
3. A guilty plea may provide some evidence of the defendant's acceptance of responsibility. However, it does not, by itself, entitle a defendant to a reduced sentence under this section.
4. Conduct resulting in an enhancement under § 3C1.1 (Willfully Obstructing or Impeding Proceedings) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§ 3C1.1 and 3E1.1 may apply.
5. The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review and should not be disturbed unless it is without foundation.

Background: The reduction of offense level provided by this section recognizes legitimate societal interests. For several reasons, a defendant who clearly demonstrates a recognition and affirmative acceptance of personal responsibility for the offense by taking, in a timely fashion, one or more of the actions listed above (or some equivalent action) is appropriately given a lesser sentence than a defendant who has not demonstrated sincere remorse.

The availability of a reduction under § 3E1.1 is not controlled by whether the conviction was by trial or plea of guilty. Although a guilty plea may show some evidence of acceptance of responsibility, it does not automatically entitle the defendant to a sentencing adjustment.

In denying the appellant a reduction of acceptance of responsibility, the sentencing court stated:

> I approach the acceptance of responsibility question really not in a broad perspective, but in a narrow perspective of what does it mean in the context of the guidelines. And I think that the purpose of giving the reduction is has the defendant taken the steps towards rehabilitation, which acceptance of responsibility is the first step toward that? In some cases, that may require no more than a plead (sic) of guilty, and in other cases, it may require a show of remorse. And I think that varies from case to case. It is an unfortunate fact in this case, and I understand Mr. Braxton's and Mr. Cribari's —the problem as he poses it, but I think he—he mis-states the problem. The—in Mr. Braxton's case, unfortunately, because of the condition in which Mr. Braxton is, he is unable to take that step, perhaps, towards rehabilitation at that time because he cannot accept responsibility. And I under—I can fully understand the conversation Mr. Cribari had with—with his client back in, you know,

why am I at St. E's., and why can't I—why am I insane, and if not, why don't I have an insanity defense here? I understand that from an academic, theoretical perspective, it all seems illogical. But I think if you focus upon the acceptance of responsibility in terms of what the purpose of that—of that reduction is given, unfortunately, Mr. Braxton here cannot appreciate and cannot take that step which acceptance of the responsibility entails and entitles him to the—to the two point reduction. So I, from a—this is not a—not making any moral judgments in the fact that Mr. Braxton hasn't accepted responsibility to the extent that he can. I—I appreciate that, and I think Doctor Blumberg is right, that he has to the extent that he can. Unfortunately, *from a legal perspective*, the extent that he can is not sufficient to entitle him to—to the two-level reduction, in light of the purpose of that reduction. So that's my sentence and—and the reasons for it.

(Emphasis added.) The judge's stated reason for refusing the two-level reduction for acceptance of responsibility demonstrates that he understood the law to require that acceptance of responsibility be a step toward rehabilitation and that the purpose of the reduction had rehabilitation as a goal. Nowhere in § 3E1.1, or in the application notes or background commentary, is the word "rehabilitation" mentioned. We have not considered rehabilitation in any of our decisions construing the meaning or application of § 3E1.1. *See United States v. White*, 875 F.2d 427 (4th Cir.1989); *United States v. Urrego-Linares*, 879 F.2d 1234 (4th Cir.), *cert. denied*, — U.S. —, 110 S.Ct. 346, 107 L.Ed.2d 334 (1989); *United States v. Harris*, 882 F.2d 902 (4th Cir. 1989).

The guideline for a reduction of sentence is addressed to whether a "defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." § 3E1.1(a). The district judge has found that Braxton accepted responsibility to the extent that he could. The problem may have been occasioned by the testimony of Dr. Neil Blumberg, a psychiatrist who had examined and evaluated the appellant. According to Dr. Blumberg, appellant acknowledged his involvement in the offense and his responsibility, but felt justified in using force because he did not wish to return to the hospital because he did not feel that he was mentally ill. The doctor found that Braxton was schizophrenic and that Braxton thought people in the hospital were talking about him and accusing him of having AIDS. The psychiatrist stated that Braxton was a borderline case of insanity: "But his illness really prevents him from experiencing remorse because of the distortion of his perception both at that time and—at the present time." Although the trial court accepted this evidence and found that Braxton was sane and had accepted responsibility to the extent that he could, the court misperceived the purpose of the guideline by interjecting into the calculus a need for rehabilitation. This was error, because rehabilitation is not a factor in the consideration of acceptance of responsibility.

We do not hold that Braxton is entitled to a two-level reduction as a matter of law, but we do hold that the sentencing judge erred when he denied the reduction as a matter of law because Braxton could not prove that he was taking steps toward rehabilitation. The sentence as to Count 2 must be set aside and Braxton resentenced. The sentence as to Count 3 is a mandatory five-year minimum consecutive sentence and it is not affected by the district court's error in sentencing on Count 2.

III

Appellant claims additional error by the district judge in applying the base offense level for attempted murder,[2] because he pled guilty only to aggravated assault of federal officers and to the use of a handgun during a crime of violence, and there was no stipulation to the more serious offense of attempted murder.

2. The base offense level for attempted murder is 20. § 2A2.1. The base offense level for aggravated assault is 15. § 2A2.2.

In establishing the applicable guidelines, § 1B1.2(a) provides:

> Determine the offense guideline section in Chapter Two (Offense Conduct) most applicable to the offense of conviction (*i.e.*, the offense conduct charged in the count of the indictment or information of which the defendant was convicted). *Provided*, however, in the case of conviction by a plea of guilty or *nolo contendere* containing a stipulation that specifically establishes a more serious offense than the offense of conviction, determine the offense guideline section in Chapter Two most applicable to the stipulated offense.

The present case is complicated because a plea agreement is not involved. Defendant pled guilty to Counts 2 and 3 of the indictment without any understanding as to what would happen to Count 1. Although this count was dismissed by the government after appellant was sentenced on Counts 2 and 3, there was no agreement that this would be done.

Since there was no plea agreement, written or oral, and there was no agreement of the facts designated to be a stipulation, we are presented with the question of whether § 1B1.2 requires that the stipulation mentioned therein be called "stipulation," or whether a defendant's agreement to the statement of facts by the government can be interpreted as a stipulation for the purposes of establishing a more serious offense than the offense of conviction under § 1B1.2(a).

At various hearings in this matter—arraignment, change of plea, and sentencing—appellant was carefully and clearly instructed that he was subject to the Sentencing Guidelines, that the court would be required to set a sentence pursuant to such guidelines, and that the court would make findings as to the proper base offense level from the evidence presented. It was never a secret that the United States Attorney was treating the offense as attempted murder, and defendant's attorney stated to the district court at sentencing: "There is lurking in the background the allegation of an attempted murder."

Braxton admitted to the court:

> I did shoot at the Marshals when my door was kicked in, but I was not trying to kill the Marshals, harm the Marshals. I was—it was all happening in such a fast instant that the only thing I could think of doing was defending my home and trying to keep them from taking me back to St. Elizabeth's.

At the change of plea hearing, appellant's attorney advised the court that he had explained the guidelines to Braxton and had explained that the court "could depart upward if you think he tried to murder the Marshals." At this same hearing the government made an oral factual presentation to the court in support of the charges against Braxton. This presentation included the firing of the two shots through the doorway while the Marshals were attempting to gain entrance, and it also included the statements of the defendant that he would kill the Marshals if they came inside and that he knew that they were Deputy United States Marshals.

Following this presentation of the facts, Braxton's attorney stated that the facts were accurate, but Braxton thought the two shots were fired almost simultaneously and not at different times. The court then addressed Braxton personally and asked him if the government could prove what it said had actually happened. Braxton answered in the affirmative.

At sentencing the district court found that these facts, which were not in dispute, supported a finding of attempted murder. This finding is subject to a clearly erroneous standard of review, *United States v. Daughtrey*, 874 F.2d 213 (4th Cir.1989), and we conclude that this finding is not clearly erroneous. However, appellant contends that under § 1B1.2(a) the district court cannot use this finding to determine the base offense level because there has not been "a stipulation specifically establishing a more serious offense than the offense of conviction." This issue is complicated by the statement made by the district judge at sentencing that the defendant

had not "stipulated" to attempted murder; however, the court went on to find that the facts as acknowledged by Braxton added up to the higher offense of attempted murder.

On the issue of base offense level, the court made the finding:

> I am fully satisfied that under the circumstances of this case, and I won't get into the technicalities whether it's under 1B1.2 or 1B1.3, that I can consider all the conduct—relevant conduct in setting the offense level and making adjustments. And I realize, and there certainly is no indication, Mr. Cribari's made it absolutely clear throughout that, Mr. Braxton, on your behalf, there has been no stipulation to Attempted Murder and the record's clear on that. But the facts, as I understand them to be, as set forth and acknowledged at the guilty plea proceeding, and even if it's not acknowledged, as they are, I can consider them under 1B1.3. One cannot, from a legal perspective, and not as a moralist, not as a theologian, not as anything else, from a legal perspective, those facts added up, in my judgment, to the—to a higher offense, and so therefore, I'm compelled to find an offense level twenty. I may say, and I won't allude to this again because it will just make the proceedings more complex, that if for some reason I was incorrect legally in making and considering those facts and setting the offense level, I would use them to depart under 1B1.4 up to the level where I am—within which I am sentencing. So whether it's deemed, whether I'm technically wrong in considering the facts in setting an offense level, I would say that I would use those same facts to depart to the extent that—that what I'm saying is a departure.
>
> The—legally, I have no doubt that the three points should be added. The specific offense characteristics are not mentioned in the guidelines. I—here the fact that the statute is in this guideline seems to me that it's perfectly clear that the guidelines contemplate that where there is an assault on a Federal Officer, these three points be added, and I think legally, that's just as clear as it could be. So I am then at the level 23.

[2] Although § 1B1.2 uses the word "stipulation" and the district judge stated that there was "no stipulation to attempted murder," we are persuaded that "stipulation" in § 1B1.2 is not used in a restrictive way so that only an agreement designated as a "stipulation" would comply with the guideline. As used in this section "stipulation" means an agreement as to the facts that specifically establishes a more serious offense than the offense of conviction. There is no requirement in the guidelines or in the commentary or application notes that this stipulation must be in writing. It is only necessary that the facts presented to the court establish a more serious crime and that the defendant agree to the statement of facts.

[3] In the present case, Braxton agreed to the proffer of facts by the government in which he admitted that he fired two shots through the doorway at the marshals, that he said he would kill them if they came in, and that he threatened to kill any additional support personnel called to the scene, if they attempted to come into his apartment. It is the agreement to these facts that qualifies as a stipulation under § 1B1.2, and these facts clearly support the district court's finding of attempted murder. In *United States v. Correa-Vargas*, 860 F.2d 35, 39 (2d Cir.1988), there was no plea agreement with stipulated facts. The defendant entered a plea to use of a communication facility in commission of a drug offense but he did not contest the presentation of facts that showed that 20 kilos of cocaine were involved. The Second Circuit concluded that the sentencing court could consider this information under § 1B1.4 which allows the court to consider any information concerning the background, character and conduct of the defendant in departing from the guidelines, or under § 5K2.0, the policy statement on grounds for departing from the guidelines, or under § 1B1.2 as an offense more serious than the offense of conviction.

In the present case the judge used § 1B1.2, but held that if this was error, he was making the upward adjustment under § 1B1.4.[3]

We find that the district court's use of § 1B1.2 was correct on the present facts.

IV

[4] Appellant objects to the district court's adjustment under § 3A1.2 by a three-point increase in the base offense level because the appellant fired at federal law enforcement officers. This section provides for a three-level increase if: "(a) the victim was a law enforcement or corrections officer ... and the offense of conviction was motivated by such status." Braxton argues that under § 2A2.2, aggravated assault has a base offense level of 15, that he was charged under 18 U.S.C. § 111 of assaulting a federal official, and that to increase his level by three would be double counting. We find no merit to this position. We have concluded that the court was correct in using a base offense level of 20 because the agreed facts support a finding of attempted murder. The calculation of this level did not consider the status of the victim, but § 3A1.2 is applicable because the victims were law enforcement officers. It is not necessary that the law enforcement officer be a casualty to be considered a victim, if the defendant knew that the person was a law enforcement officer and assaulted such officer in a manner creating a substantial risk of serious bodily injury. Section 3A1.2(b). These sections fit the facts of the present case and the district judge did not err in his application of the guidelines and in adding three levels to the base offense.

Therefore, we affirm the district court in its use of a base offense level of 20 for attempted murder pursuant to § 1B1.2 and we approved the three-level increase under § 3A1.2 because the victims were law enforcement officers, but we reverse the denial of a two-level reduction for acceptance of responsibility and remand for resentencing without any reference to or consideration of rehabilitation. We express no opinion as to whether a two-level reduction should be granted when this issue is reconsidered.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR RESENTENCING.

SPROUSE, Circuit Judge, concurring in part and dissenting in part:

I concur in Part II of the opinion holding that rehabilitation is not a factor in the consideration of acceptance of responsibility. I respectfully dissent, however, from Part III of the opinion where my brothers hold that Braxton stipulated under a more serious offense thus permitting an enhancement under guideline section 1B1.2. In my view, "stipulation" as it is used in section 1B1.2(a) at least means an agreement between a defendant and the government.

3. Section 1B1.4. *Information To Be Used In Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines).*

In determining the sentence to impose within the guideline range, or whether a departure

ORIGINAL

No. 90-5358

FILED
OCT 11 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THOMAS BRAXTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly determined the applicable offense Guideline under Sentencing Guidelines § 1B1.2 on the basis of undisputed facts presented at petitioner's plea proceeding that were not part of a plea agreement.

IN THE SUPREME COURT OF THE UNITED STATES

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, Pet. App. 1-8, is reported at 903 F.2d 292.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1990. The petition for a writ of certiorari was filed on August 3, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the District of Maryland on one count of assaulting a federal officer, in violation of 18 U.S.C. 111, and one count of using a

firearm in the commission of a crime of violence, in violation of 18 U.S.C. 924(c). He was sentenced under the Sentencing Guidelines to consecutive terms of imprisonment of 63 months on the assault count and 60 months on the firearms count, to be followed by a three-year term of supervised release. He was also ordered to pay a $50 special assessment.

1. The facts underlying the convictions, which are not in dispute, are set forth in the court of appeals' opinion and in the transcript of the plea proceeding. Pet. App. 2; C.A. Supp. App. 20-23. In September 1974, petitioner was confined to St. Elizabeth's Hospital after he was found not guilty by reason of insanity in the United States District Court for the District of Columbia on a charge of bank robbery. On May 12, 1988, the United States Marshal for the District of Columbia received an arrest warrant charging petitioner with unauthorized leave from the hospital. On June 9, 1988, the Marshal's Service learned that petitioner was living in Mt. Rainier, Maryland. Early the next morning, four deputy United States marshals went to petitioner's apartment, knocked on the door, and announced that they had a warrant for petitioner's arrest. Although no one answered the door, the deputy marshals could hear movement in the apartment. They knocked again, identified themselves, and unlocked the door. Petitioner then fired a .38 caliber revolver through the doorway, but no one was hit. Shortly thereafter, petitioner fired another round through the doorway, again hitting no one. Petitioner told the marshals he was not coming out and that he was not going back

to the hospital. He threatened to kill them if they came into the apartment. The deputy marshals called for reinforcements, and the Prince Georges County Emergency Response and Crisis Intervention Team arrived and took over. Petitioner fired two more shots before he was eventually subdued with tear gas and arrested. Pet. App. 2; C.A. Supp. App. 22. After his arrest, petitioner stated that he knew the marshals were knocking on the door but he did not want to return to the hospital. Pet. App. 2; C.A. Supp. App. 23.

2. Petitioner was indicted on three counts: (1) attempting to kill the four deputy marshals, in violation of 18 U.S.C. 1114; (2) assaulting the marshals, in violation of 18 U.S.C. 111; and (3) using a firearm in the commission of a crime of violence, in violation of 18 U.S.C. 924(c). Petitioner's counsel obtained an eight-month continuance for a psychiatric examination, after which he advised the court that petitioner was competent to stand trial and would not enter an insanity defense. Pet. App. 2.

In May 1989, petitioner pleaded guilty without a plea agreement on the assault and firearms counts. Pet. App. 2-3. After the government recited the facts set forth above, petitioner agreed that the government could prove the facts stated with two exceptions. First, petitioner disagreed that the two bullets aimed at the deputy marshals were fired at different times. Second, petitioner disagreed that the gun was on his person when he was arrested, stating instead that it was found in the apartment. C.A. Supp. App. 23-24. The district court determined that petitioner understood the rights he waived by pleading guilty, informed him

that the court would determine how the Sentencing Guidelines applied to him, reminded him that the attempted murder count was still outstanding, and found that there was a factual basis for the plea. C.A. Supp. App. 6-25. At this juncture, petitioner's counsel informed the district court that he had explained to petitioner that, despite the absence of a formal plea agreement, the government might be induced to dismiss the attempted murder count if it were satisfied with the sentence on the counts on which petitioner pleaded guilty. Id. at 15-16.

3. At sentencing, the district court determined -- on undisputed facts -- that petitioner committed attempted murder and therefore should be sentenced for the assault offense under Guidelines § 2A2.1, relating to attempted murder, rather than under Guidelines § 2A2.2, relating to aggravated assault. Pet. App. 6. The district court calculated petitioner's applicable Guideline range to be from 51 to 63 months in prison, based on a total offense level of 23 and a criminal history category of II. [1] It

[1] The total offense level of 23 is derived from a base offense level of 20 under Guidelines § 2A2.1(a), plus 3 points under Guidelines § 3A1.2(a) because the victims were federal law enforcement officers. If petitioner had been sentenced under the aggravated assault Guideline, assuming no upward departure because of the seriousness of the offense, his adjusted offense level would have been 18 points (derived from a base offense level of 15 points under Guidelines § 2A2.2(a), plus 3 points under Guidelines § 3A1.2(a) because the victims were federal law enforcement officers).

Petitioner was also convicted and sentenced for using a firearm in the commission of a crime of violence in violation of 18 U.S.C. 924(c), to which a mandatory, consecutive term of imprisonment of five years applies. See 18 U.S.C. 924(c); Sentencing Guidelines § 2K2.4. Therefore, petitioner's adjusted (continued...)

based this conclusion on the fact that Guidelines § 1B1.2 requires the court to apply the Guideline "most applicable to the offense of conviction," "[p]rovided, however," that where a guilty plea or plea of nolo contendere "contain[s] a stipulation that specifically establishes a more serious offense than the offense of conviction," the court must apply the Guideline "most applicable to the stipulated offense" (emphasis omitted).

Petitioner's counsel argued that the proviso to Guidelines § 1B1.2 is not applicable here because petitioner did not stipulate to a more serious offense but only entered "a plea, like every other plea, where [the defense] acknowledge[d] the statement of fact, said, that's what happened." C.A. App. 46. Rather than "get into the technicalities whether it's 1B1.2 or 1B1.3" (the latter provision defines relevant conduct for sentencing), the district court observed that it could "consider all the conduct -- relevant conduct in setting the offense level and making adjustments." Pet. App. 7. Relying on Guidelines § 1B1.3, the district court held that petitioner's conduct constituted attempted murder, and sentenced petitioner accordingly. Pet. App. 7. In the alternative, the district court said that it would reach the same result even if it accepted petitioner's argument that the aggravated assault Guideline was applicable:

[1](...continued)
offense level was not increased by the 5 points that would otherwise apply because petitioner discharged a firearm in the course of committing the offense. See Sentencing Guidelines §§ 2A2.1(b)(2)(A), 2A2.2(b)(2)(A); id. § 2K2.4, Application Note 2.

> [I]f for some reason I was incorrect legally in making and considering those facts and setting the offense level, I would use them to depart under 1B1.4 up to the level where I am -- within which I am sentencing.

Pet. App. 7.

4. The court of appeals affirmed. Pet. App. 1-8. It held that the district court properly applied the Guideline for attempted murder in accord with Sentencing Guidelines § 1B1.2. It reasoned that the authority set forth in that Section to use a stipulation to determine the applicable Guideline was not limited to formal written stipulations, but instead applied to "an agreement as to the facts that specifically establishes a more serious offense than the offense of conviction." Pet. App. 7. It found that petitioner's agreement with the government's proffer of facts constituted such a stipulation, and that the stipulated facts supported the district court's finding that petitioner committed attempted murder. Ibid. [2/] In light of its conclusion, the court of appeals did not reach the district court's alternative holdings that petitioner's sentence could be upheld either as an application of Guidelines § 1B1.3 (defining relevant conduct), or as an upward departure from the sentencing range applicable to the offense of aggravated assault. Pet. App. 8.

[2/] The court of appeals agreed with petitioner's contention that the district court erred in declining to consider whether he was entitled to a 2-point reduction for acceptance of responsibility; it remanded for a determination whether petitioner was entitled to the reduction. Pet. App. 3-5. The court of appeals also held that the district court correctly added 3 points to petitioner's offense level because his victims were law enforcement officers. Id. at 8. Petitioner does not challenge these rulings in this Court. Pet. 5-6.

Judge Sprouse dissented on the majority's interpretation of Guidelines § 1B1.2. Pet. App. 8. In his view, a stipulation requires an explicit agreement. Ibid.

ARGUMENT

Petitioner contends that the court of appeals improperly calculated his sentence under Sentencing Guidelines § 1B1.2. Pet. 6-10. In petitioner's view, the sentencing court must apply the Guideline applicable to the offense of conviction unless a plea agreement includes a written stipulation to facts that show that he committed a more serious offense. No stipulation so defined existed in this case. Petitioner's construction is erroneous and does not merit the attention of this Court.

1. Calculation of the base offense level applicable to an offense involves three steps.

a. First, the sentencing court must determine under Guidelines § 1B1.2 which Guideline applies to the offense of conviction. That Section requires in subsection (a) that the sentencing court

> [d]etermine the offense guideline in Chapter Two (Offense Conduct) most applicable to the offense of conviction * * *. Provided, however, in the case of conviction by a plea of guilty or nolo contendere containing a stipulation that specifically establishes a more serious offense than the offense of conviction, determine the offense guideline section in Chapter Two most applicable to the stipulated offense.

Application Note 1 to Guidelines § 1B1.2 explains that:

> [t]he exception to the general rule [that applies in the event of a stipulation] has a practical basis. In cases where the elements

> of an offense more serious than the offense of conviction are established by the plea, it may unduly complicate the sentencing process if the applicable guideline does not reflect the seriousness of the defendant's actual conduct. Without this exception, the court would be forced to use an artificial guideline and then depart from it to the degree the court found necessary based upon the more serious conduct established by the plea. The probation officer would first be required to calculate the guideline for the offense of conviction. * * * Then, the probation officer might need to calculate the * * * guideline [for the more serious offense established by the stipulated facts] in determining the appropriate degree of departure in a case in which the defendant pled guilty to [one offense] but admitted committing [a more serious offense]. This cumbersome, artificial procedure is avoided by using the exception rule in guilty or nolo contendere plea cases where it is applicable.

Pursuant to Guidelines § 1B1.2, the courts of appeals have consistently held that, if a defendant has agreed to facts establishing a more serious offense than the one to which he has pleaded guilty, the sentencing court must impose a sentence appropriate for the more serious offense. See, e.g., United States v. Castro-Cervantes, No. 89-50145 (9th Cir. Aug. 9, 1990); United States v. Roberts, 898 F.2d 1465 (10th Cir. 1990); United States v. Martin, 893 F.2d 1990 (5th Cir. 1990); United States v. Strong, 891 F.2d 82 (5th Cir. 1989).

b. Second, once the sentencing court determines the applicable Guideline, it must determine the applicable sentencing range in accord with Sentencing Guidelines § 1B1.3 (relevant conduct). Sentencing Guidelines § 1B1.2(b). Section 1B1.3 provides that in determining the applicable sentencing range, the sentencing court shall consider, inter alia,

> all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense; [and]
>
> * * * * *
>
> all harm that resulted from the acts or omissions [described] above, and all harm that was the object of such acts or omissions[.]

Sentencing Guidelines § 1B1.3(a)(1), (a)(3).

c. Finally, if the applicable Guideline does not adequately consider an aggravating or mitigating factor present in the case that should result in a sentence different from that specified in the applicable sentencing range, the sentencing court may depart from the applicable Guideline, stating its reasons for doing so. 18 U.S.C. 3553(b), (c). "In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See 18 U.S.C. §3661." Sentencing Guidelines § 1B1.4. Accordingly, the courts of appeals have held that the sentencing court may depart upward from the Guideline applicable to the offense of conviction in order to impose a sentence reflecting the real offense, even if the defendant did not enter into a stipulation in connection with a guilty plea. See, e.g., United States v. Castro-Cervantes, supra; United States v. Zamarripa, 905 F.2d 337 (10th

Cir. 1990); United States v. Kim, 896 F.2d 678, 684-685 (2d Cir. 1990); United States v. Rutter, 897 F.2d 1558 (10th Cir. 1990); United States v. Strong, 891 F.2d at 85. An upward departure may be based on the Guideline that would have applied if the defendant had been convicted of the more serious offense (subject, of course, to the statutory maximum sentence applicable to the offense of conviction). See, e.g., United States v. Kim, 896 F.2d at 684-685; United States v. Strong, 891 F.2d at 85.

2. In this case, the court of appeals correctly concluded that petitioner's acceptance of the government's proffer of facts at the plea proceeding constituted a stipulation within the meaning of Sentencing Guidelines § 1B1.2(a).

a. We agree with the court of appeals that "stipulation" means "an agreement as to the facts that specifically establishes a more serious offense than the offense of conviction." Pet. App. 7. The language of the proviso requires only that the stipulation "specifically establish[]" the offense; it does not require the stipulation to be "formal," Pet. 7, nor does it require that it be in writing. Moreover, the purpose of the proviso permitting sentencing on a stipulation is fully served here. The district court made clear that it would have imposed the same sentence whether it sentenced petitioner directly under the attempted murder Guideline or sentenced him by departing from the aggravated assault Guideline. The district court took the less cumbersome approach, consistent with the purpose of avoiding unnecessarily complicated sentencing proceedings in plea situations.

b. Petitioner offers no convincing reason why "stipulation" should be defined more narrowly, as consideration of the possible restrictive definitions demonstrates.

First, Guidelines § 1B1.2 cannot fairly be read to require that the defendant stipulate to the offense itself rather than to facts establishing the offense. The proviso refers to "a stipulation that specifically establishes a more serious offense" (emphasis added), thereby contradicting the notion that the defendant must stipulate to the offense itself. Significantly, petitioner's authorities repeatedly hold stipulations to facts establishing the elements of an offense to be "stipulations" within the meaning of Guidelines § 1B1.2. United States v. Martin, 893 F.2d 73, 76 (5th Cir. 1990) ("stipulated facts" can establish guilt); United States v. Strong, 891 F.2d 82, 83, 84, 85 (5th Cir. 1989) ("stipulated to facts" establishing guilt); United States v. Garza, 884 F.2d 181, 181 (5th Cir. 1989) (same).

Second, Guidelines § 1B1.2 does not imply that a stipulation must be in writing. Again, the proviso expressly states the requirements for an effective stipulation: it must be in conjunction with a plea of guilty or nolo contendere and must "specifically establish[]" the more serious offense. None of the cases or commentary cited by petitioner requires a stipulation to be in writing.

Third, the stipulation need not be part of a plea agreement. Again, the text of Guidelines § 1B1.2 requires only that the stipulation be made "in the case of conviction by a plea of guilty

or nolo contendere." The requirement of an agreement is neither stated nor implied. Although the commentary cited by petitioner does draw this conclusion, see Wilkins & Steer, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S. Car. L. Rev. 495, 501 (1990), it does so based on the authority of the four court of appeals cases cited at Pet. 7-8. Those cases do not support petitioner's contention that a stipulation must be a quid pro quo for a plea to a lesser charge. [3] Even if Guidelines § 1B1.2 did require a stipulation to be the consideration for a plea to a lesser charge, petitioner received the benefit of his tacit plea bargain when the government decided, in accord with the discussion among the parties and the court at the plea proceeding, to dismiss the attempted murder count following sentencing because the sentence on the assault count adequately reflected the seriousness of petitioner's conduct.

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[3] The case coming closest to that conclusion is United States v. Guerrero, 863 F.2d 245 (2d Cir. 1988), which stated that "facts admitted by the defendant to shorten or obviate a sentencing hearing do not establish a 'stipulated offense' within the meaning of section 1B1.2(a)." Id. at 248. The court of appeals thereby distinguished between a stipulation entered into at a plea proceeding (the kind at issue here) and one entered into at a sentencing hearing (the kind at issue in Guerrero):

> The proviso applies only to a stipulation contained in a plea of guilty or nolo contendere, not to a stipulation negotiated after a plea in connection with sentencing.

Ibid. We disagree with the distinction drawn by the court of appeals in that case because it finds no support in the text of Guidelines § 1B1.2; that Section requires a stipulation to be in a "case of conviction" by plea, but nowhere requires the stipulation to be made contemporaneously with the plea. In any event, the Guerrero court's distinction does not help petitioner, because his stipulation occurred during the course of the plea proceeding.

3. Whether "stipulation" for purposes of Guidelines § 1B1.2 is construed broadly or narrowly, petitioner's sentence would not be affected because it is sustainable on either of two independent grounds.

First, the district court sentenced petitioner according to the attempted murder Guideline under Guidelines § 1B1.3 (relevant conduct). That Section authorizes the sentencing court to take into account "all acts and omissions committed or aided and abetted by the defendant * * * that occurred during the commission of the offense of conviction." See pp. 8-9 (quoting § 1B1.3), supra. Petitioner attempted to murder the deputy marshals at the same time he committed the assault and firearms violations. That attempt is therefore relevant conduct within the meaning of Guidelines § 1B1.3.

Alternatively, the district court announced its intention to depart upward and impose precisely the same sentence even if the Guideline for aggravated assault were applicable. See pp. 5-6, supra. Indeed, petitioner's counsel invited the district court at the plea proceeding to "depart upward if you think [petitioner] tried to murder the Marshals." Pet. App. 6.

In light of these two independent grounds -- neither of which is challenged by petitioner in this Court -- his sentence does not warrant review. Cf. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984) (Court "reviews judgments, not opinions").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

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OCTOBER 1990

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No. 90-5358

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THOMAS BRAXTON,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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No. 90-5358

IN THE
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THOMAS BRAXTON,

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v.

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Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Thomas Braxton, the Petitioner, has raised the question of whether "a stipulation that specifically establishes a more serious offense than the offense of conviction," according to United States Sentencing Guideline Section 1B1.2(a), can exist in light of a finding of fact that "there was no plea agreement, written or oral, and there was no agreement of the facts designated to be a Stipulation." United States v. Braxton, 903 F.2d 292, 297 (4th Cir. 1990). In this case, Mr. Braxton pleaded guilty without a

plea agreement to a charge of assault on federal officers, but received a sentence calculated on a charge of attempted murder which was subsequently dismissed by the government.

Respondent raises a series of arguments in support of its position that this Court should not consider whether a stipulation within the meaning of U.S.S.G. 1B1.2(a) may exist in the absence of a plea agreement or a stipulated set of facts. None of these arguments, however, address directly the substantive points raised in the Petition.

First, Respondent ignores authority in other Circuit Courts of Appeal which holds that the stipulation contemplated under U.S.S.G. Section 1B1.2(a) is a formal agreement between the government and the defendant. See, e.g., United States v. Garza, 884 F.2d 181 (5th Cir. 1989); United States v. Guerrero, 863 F.2d 245 (2d Cir. 1988). Moreover, Respondent summarily dismisses Judge William Wilkins' commentary on the intent of the United States Sentencing Commission in drafting U.S.S.G. Section 1B1.2(a). Judge Wilkins, as Chairman of the United States Sentencing Commission, is perhaps the best authority on Sentencing Guidelines interpretation. Thus, Judge Wilkins' opinion that Section 1B1.2 contemplates a negotiated quid pro quo cannot be taken lightly. Wilkins, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 South Carolina L. Rev. 495, 501 (1990). See United States v. Strong, 891 F.2d 82, 85 (5th Cir. 1989).

Second, even assuming that section 1B1.2 does not envision a formal agreement made as part of the plea bargaining process,

Respondent overlooks two critical portions of the record from the district court: (1) the district court specifically found that the parties did not enter into a stipulation under Section 1B1.2 and (2) Respondent specifically denied any intent to kill, thereby raising a disputed factual issue regarding the attempted murder charge. Therefore, contrary to Respondent's assertions the Mr. Braxton agreed to the attempted murder offense, and the Fourth Circuit's redefinition of "stipulation" as a kind of public agreement, Respondent never agreed to facts establishing attempted murder,[1] the offense on which his assault on federal officers guideline was based.

Third, Respondent suggests that U.S.S.G. Section 1B1.3 and the right of a court to depart upward provide alternative bases for Petitioner's sentence. Section 1B1.3 does not apply because none of the triggering factors necessary for its application are present in this case. Upward departures, moreover, must be guided, with an articulated justification for each step upward in a base offense level or criminal history calculation. See, e.g., United States v. Montenegro-Rojo, ___ F.2d ___, 47 Cr. L. Rep. 1370, Slip Op. No. 88-5161 (9th Cir. July 11, 1990); United States v. Nuno-Para, 855 F.2d 1409 (9th Cir. 1989); United States v. Cervantes, 878 F.2d 50 (2d Cir. 1989); United States v. Lopez, 871 F.2d 513 (5th Cir.

[1] Respondent's statement made at the time of his plea and in reply to the government's statement of facts that he thought the two shots were fired simultaneously is further evidence that Respondent disagreed with the facts supporting attempted murder. See United States v. Braxton, 903 F.2d 292, 297 (4th Cir. 1990). This is of course significant because the timing of the shots is circumstantial evidence of defendant's intent.

1989). Upward departures cannot be justified by general statements, like that used by the trial court in this case, that the trial court would somehow depart to give a certain sentence. Braxton, 903 F.2d at 298 (4th Cir. 1990).

Finally, Respondent's brief sets forth a position that would result in the complete breakdown of the plea bargaining process. Under Respondent's theory, anytime a defendant agreed to a statement of facts establishing a more serious offense the sentencing court could determine the base offense level using the more serious offense. A court could do this despite the presence of a plea agreement establishing a lesser base offense level, or, as in this case, despite the fact that the sentencing court found as a matter of fact that no Section 1B1.2(a) stipulation had been entered into by the parties.

This scenario also would negate the need for the court to determine, in deciding to accept an agreement under U.S.S.G. Section 6B1.2(a), p.s., whether the charges remaining in a plea agreement after a negotiated dismissal of other charges "adequately reflect the seriousness of the actual offense behavior." Instead, the court could simply accept the plea agreement and calculate the guideline based upon the more serious offense.

CONCLUSION

In conclusion, this Court should issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit so that it may review the substantial question of law presented by the petition.

Respectfully submitted,

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October 25, 1990

No. 90-5358

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THOMAS BRAXTON,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the Petitioner's Reply attached hereto was mailed, first class postage pre-paid, this 25th day of October, 1990, to The Solicitor General, Department of Justice, Washington, D.C. 20530.

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No. 90-5358

IN THE

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OCTOBER TERM, 1990

THOMAS BRAXTON,

Petitioner

v.

UNITED STATES

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 3, 1990
CERTIORARI GRANTED NOVEMBER 13, 1990

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RELEVANT DOCKET ENTRIES

DATE	No.	PROCEEDINGS
1988		
Aug. 2	1	Indictment filed
Aug. 22	5	Federal Public Defender appointed Defendant arraigned on August 17, 1988, entered pleas of not guilty
Aug. 25	6	Order of August 23, 1988, that defendant be detained
1989		
May 23		Defendant rearraigned on May 17, 1989: guilty counts 2 and 3, not guilty count 1
July 10	13	Sentencing Memorandum of United States
July 26	14	Judgment as to Defendant
July 31	15	Notice of Appeal
Oct. 25	18	Order of October 24, 1989, designating place of confinement
1990		
May 30	20	Order of Judgment of U.S. Court of Appeals for the Fourth Circuit affirming in part, reversing and remanding in part
July 31	21	Defendant resentenced July 26, 1990 July 31, 1990, grounds privileges and community custody order
Sept. 26	22	July 26, 1990, Resentencing Judgment and Commitment as to Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. JFM-88-0252

UNITED STATES OF AMERICA

v.

THOMAS BRAXTON

(Attempt to Murder Deputy U.S. Marshals, 18 U.S.C. § 1114; Assault on a Federal Officer, 18 U.S.C. § 111; Use of a Firearm During a Crime of Violence, 18 U.S.C. § 924(c); Aiding and Abetting, 18 U.S.C. § 2).

INDICTMENT

The Grand Jury for the District of Maryland charges:

On or about June 10, 1988, in the State and District of Maryland,

THOMAS BRAXTON

did willfully attempt to kill Joseph Jenkins, Mark Shealey, Thomas Carruthers and Darryl A. Kelley, deputies of the United States Marshal Service, Department of Justice, while said deputies were engaged in and on account of the performance of their official duties.

18 U.S.C. § 1114

18 U.S.C. § 2

COUNT TWO

And the Grand Jury further charges:

On or about June 10, 1988, in the State and District of Maryland,

THOMAS BRAXTON

did willfully and forcibly, with a deadly and dangerous weapon, assault, oppose, impede, intimidate and interfere with Joseph Jenkins, Mark Shealey, Thomas Carruthers and Darryl A. Kelley, Deputy United States Marshals, Department of Justice, while said deputies were engaged in and on account of the performance of their official duties.

18 U.S.C. § 111

18 U.S.C. § 2

COUNT THREE

And the Grand Jury further charges:

On or about June 10, 1988, in the State and District of Maryland,

THOMAS BRAXTON

knowingly did use and carry a firearm during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, that is a violation of 18 U.S.C. Section 111.

18 U.S.C. § 924(c)

18 U.S.C. § 2

A TRUE BILL:

Foreperson

BRECKINRIDGE L. WILLCOX
United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Docket No. JFM-88-0252

(Title Omitted in Printing)

TRANSCRIPT OF REARRAIGNMENT
BEFORE THE HONORABLE J. FREDERICK MOTZ
UNITED STATES DISTRICT JUDGE

* * * *

[3] PROCEEDINGS

(Call to Order of the Court)

THE CLERK: This Honorable Court will resume its session. The Honorable J. Frederick Motz is presiding.

THE COURT: Good afternoon.

MR. CRIBARI: Good afternoon, Your Honor.

MS. RINGLER: Good afternoon, Your Honor.

THE COURT: Ms. Ringler?

MS. RINGLER: Thank you, Your Honor. The Government calls the case of United States versus Thomas Braxton, Criminal Number 88-0252. It is my understanding from speaking with Mr. Cribari that Mr. Braxton, at this time, wishes to change his plea as to Counts Two and Three of the Indictment pending against him. There is no plea agreement with the United States Attorney's office.

THE COURT: All right.

MS. CRIBARI: Your Honor, that's correct.

THE COURT: No plea agreement. Okay? Ms. Turner?

THOMAS L. BRAXTON, DEFENDANT, SWORN

THE CLERK: Sir, would you please state your name for the record?

THE WITNESS: My name is Thomas Louis Braxton.

THE CLERK: And would you state your age and your date of birth?

THE WITNESS: My age is 39. My date of birth [4] 7/1/49.

THE CLERK: Sir, on August 17, 1988, you were—'88, is that the correct date?

THE COURT: '88, that's correct.

MS. RINGLER: That's correct.

THE CLERK: You were arraigned, and at that time you plead not guilty to a three count indictment. Do you wish to change your plea at this time?

MR. CRIBARI: At this time, we wish to change the plea on Counts Two and Three. Those are the assault counts and the handgun counts, only, to a plea of guilty. My records indicate that the arraignment was on August 19th, not August 17th.

THE CLERK: All right.

MR. CRIBARI: And we would like to leave our not guilty plea existing on Count One of the attempted murder count.

THE CLERK: Thank you very much.

THE COURT: All right. Mr. Braxton, before I accept your plea, I have to ask you some questions. Now, if you don't understand any of my questions, at any time, let me know. All right?

THE WITNESS: Yes, sir.

THE COURT: Now, you understand that you're under oath so that if you knowingly give a false answer to any [5] question, you could be prosecuted for perjury?

THE WITNESS: Yes, sir.

THE COURT: Okay.

EXAMINATION BY THE COURT

BY THE COURT:

Q How far have you gone in school?

A Twelve years of college. A little over 12 years of college.

Q Can you read and write?

A Yes, sir.

Q In the last 24 hours, have you taken any drugs? In that case—

MR. CRIBARI: Your Honor, Mr. Braxton takes Prolixan every night at St. Elizabeth's and is under the care of doctors, psychiatrists, psychologists, and medical doctors at St. Elizabeth's Hospital which, I guess, is within the District of Columbia. Other than his medication, he has taken no drugs, but he does receive that medication every night.

BY THE COURT:

Q Now, with those drugs do you understand what's going on a day? Is your medication affected you in any way to prevent you from understanding what's happening today?

A No, sir.

Q Have you consumed any alcohol in the last 24 hours?

[6] A No, sir.

Q Are you satisfied with the services that Mr. Cribari has given to you as your lawyer in this case?

A Yes, sir. I am.

Q Now, I'm going to go over the charges with you to make sure that you understand what they are. Now, you've received a copy of the Indictment and reviewed it with Mr. Cribari, haven't you?

MR. CRIBARI: That's this.

THE COURT: That's the charge.

MR. CRIBARI: That is what we went over last summer. Do you remember that?

THE WITNESS: Right, yeah. Yes, sir. I have a copy of that. I had a copy.

BY THE COURT:

Q Now, in Count Two, what you're charged with is that on or about June 10th, 1988, here in Maryland, you assaulted United States Marshals during the course of their performance of their official duties. Do you understand that?

A Yes, sir.

Q And that do you understand that in order to be convicted of that offense, the Government would have to prove that on or about that time stated, you, with using a deadly and dangerous weapon, you did willfully and forcibly, knowing what you were doing, somehow assault or resist or intimidate [7] various Deputy United States Marshals who are listed there, and that they were—those people were engaged in their official duties at the time that you assaulted them. Do you understand that?

A Yes, sir.

Q Do you understand that in Count Three you are charged with carrying a firearm during that assault, which is charged in Count Two. Do you understand that?

A Yes, sir.

Q Do you understand that in order to be convicted of that offense, the Government would have to prove that on or about the time stated, in this state here in Maryland, you knowingly used the firearm, knowingly and willfully knowing what you were doing, during the commission of a crime of violence which is chargeable under Federal law. Do you understand that?

A Yes, sir.

Q And specifically, I think it is—I'm corrected or not—the assault which is charged in Count Two. Is that right counsel?

MS. RINGLER: Yes, Your Honor.

THE COURT: Fine. Now, counsel what are the maximum statutory penalties?

MR. CRIBARI: Your Honor, my understanding is that the penalty on the handgun charge is five year mandatory [8] minimum consecutive charge. That there is a minimum maximum as the same penalty. On the assault—

MS. RINGLER: I believe the assault is 10 years, Your Honor. Let me make certain.

MR. CRIBARI: I think the assault is a 10 year charge, but subject to the sentencing guideline provision, Your Honor.

THE COURT: And what's the fines?

MR. CRIBARI: I believe on each its a $250,000 fine with a $50 special penalty fine on each count. And, of course, Mr. Braxton, under the guidelines would be subjected to the possibility of cost of imprisonment and the various penalties, similar penalties which I don't think will be applicable, but nevertheless, would apply.

BY THE COURT:

Q All right. Now, let me go over with you to make sure what you understand what the maximum statutory penalty is. On the assault, it's 10 years imprisonment, a fine of $250,000, a $50 special assessment, plus under the sentencing guidelines where there are costs of imprisonment and things of that nature. Do you understand that?

A Yes, sir.

Q And on the Count Three, that gun charge, what it is is in five years minimum and consecutive to whatever sentence is imposed on the other, on Count Two, again a $250,000 fine, a [9] $50 special assessment and costs of imprisonment. Do you understand that?

A Yes, sir.

Q Okay. And you understand that special assessment also is both a maximum and a minimum in the sense that you have to be charged, you have to have that $50 special assessment imposed upon you. Do you understand that?

A Yes, sir.

THE COURT: Ms. Ringler, is there any questions you have about that?

MS. RINGLER: No, Your Honor. I checked the statute and the 10 years is for the assault.

THE COURT: Thank you.

BY THE COURT:

Q Now, you also, under the guidelines, under the statute under the guidelines, are subject to what is called supervised release. Do you understand that?

A Yes, sir.

Q And that is, that after whatever period of incarceration you get, you can be sentenced up to—now it is five years on each count? Does anybody know? Or would it be five years total?

MS. RINGLER: Your Honor, as to Count Two, it's a three year term of supervised release, and that's the same as to Count Three. They're both three.

[10] THE COURT: Now, could they be consecutive to one another?

MR. CRIBARI: Your Honor, it's my—

MS. RINGLER: It's my understanding that it would be three years altogether.

MR. CRIBARI: I think that's right, Your Honor.

THE COURT: I think that's right, too.

MR. CRIBARI: And please understand that when Mr. Braxton and I have discussed the concept of supervised release, or any supervision, after he's through with the Federal sentence, he would go back to St. Elizabeth's. So we've also discussed it in terms of his supervision would encompass his being at St. Elizabeth's.

BY THE COURT:

Q Do you understand that, Mr. Braxton? Presumably, that's where you'll be. But—

A Yes, sir.

Q —conceptually, at least, and I've got to go over this with you, that after any period of incarceration on these charges, you would be subject to a three-year period of supervised release. Do you understand that?

A Yes, sir.

Q And the way that would work is, I mean, if you for some reason were not on—if you violated—you have to be on good behavior for those three years, essentially, and if you [11] did something to violate your conditions of release, I could sentence you back to another three years, the maximum—whatever I imposed on you for supervised release up to that three years without giving you credit for the time that you'd behaved yourself on supervised release. Do you understand that?

A Yes, sir.

Q And that if—under the guidelines, I would have to do that to, basically, revoke your supervised release in the event that you committed a new crime. Do you understand that?

A Yes, sir.

Q Okay. Now, by pleading guilty, you're giving up certain rights and I want to make sure you understand what those rights are. You understand that you have a right to a trial by jury?

A Yes, sir.

Q And you understand that you'd also have the right to be tried by a district judge if you wanted to waive your right to a trial by jury and the Government was willing to waive its right to a trial by jury. Do you understand that?

A Yes, sir.

Q Do you understand that in any trial you would be presumed innocent and the burden would be on the Government to prove your guilt beyond a reasonable doubt. Do you [12] understand that?

A Yes, sir.

Q And do you understand that in any trial you'd have the right to be represented by a lawyer?

A Yes, sir.

Q And do you understand that if you can not afford a lawyer, one would be appointed to represent you at the Government's expense?

A Yes, sir.

Q Do you understand that in any trial, you'd have the right to cross examine everybody who testified against; that is, to ask questions of them?

A Yes, sir.

Q Do you understand that you'd have the right to compel people to come in and testify on your behalf by having subpoenas issued for them?

A Yes, sir.

Q Do you understand that in any trial, if you wanted to, you could take the stand and testify in your own defense? That you could testify if you wanted to, do you understand that?

A Yes, sir.

Q And do you understand that, on the other hand, nobody could force you to take the stand. Do you understand that?

A Yes, sir.

[13] Q And do you understand that if you decided not to take the stand, nobody could draw what the law calls to be an adverse inference from the fact that you decided not to testify; that is, nobody could find that—excuse me, that you were a bad person, or specifically that you didn't—that you didn't—that you did commit the offenses you were charged with because you decided not to testify. Do you understand that?

A Yes, sir.

Q And you understand that if you chose to be tried by a jury, in order to be convicted, their verdict would have to be unanimous; that is, that each and every one of them would have to agree. Do you understand that?

A Yes, sir.

Q And you understand that by pleading guilty, you're giving up each and every one of those rights?

A Yes, sir.

Q And there's been mention of the fact of St. Elizabeth's. Do you understand also about pleading guilty, you're giving up any right to challenge that you were mentally incompetent at the time you committed the offense. Do you understand that?

A Yes, sir.

MR. CRIBARI: Your Honor, please let me add to the record that I've explained to Mr. Braxton that while he would [14] give up any kind of insanity defense to the trial, we certainly think that might bear on the appropriate sentence to be given. So the issue of his mental state and insanity might may well be a sentencing argument. It's not completely divorced from this case, but it is not a defense to what happened.

THE COURT: That's correct.

BY THE COURT:

Q Do you understand that, Mr. Braxton?

A Yes.

Q That it may, you know—it's certainly something Mr. Cribari can say at sentencing. It would be up to me to take that into account as I see fit. It's entirely up to me. But in terms of—but you're waiving the right in terms of the offense itself to claim, basically, insanity as a defense of the crime. Do you understand that?

A Yes, sir.

Q Now, I also need to satisfied that you're entering this plea voluntarily. Now, has anybody used any forced against you to get you to enter the plea?

A No, sir.

Q All right. Has anybody used or made any threats against you to get you to enter the plea?

A No, sir.

Q Has anybody made any kind of promise or inducement or [15] anything else of any kind to get you to enter the plea?

A No, sir.

Q Are you aware of anything that anybody said on behalf of the Government, Mr. Cribari, anybody, because

I understand there's no plea agreement, to induce you to enter this plea? Any kind of promises or representations made at all?

A No, sir.

MR. CRIBARI: Your Honor, I guess I should put on the record that, obviously, since we're only pleading to two counts, we did discuss the possibility that at sentencing the Government may well be induced to drop the remaining count.

THE COURT: Well, I was going to ask that. I take it there's no formal agreement to that effect?

MS. RINGLER: There's no formal agreement, Your Honor. I have told Mr. Cribari that at the time of sentencing, the Government will re-evaluate, and if appropriate, dismiss Count One, following sentencing.

THE COURT: So I understand, Braxton—Mr. Braxton, the Government is reserving its right to decide what to want to do, but if, in fact, there have been discussions and as far as they go, it's basically, the Government, at the time of sentencing, I guess, frankly, if it comes down to the fact that you're satisfied with whatever sentence I impose, then you may evaluate and move to dismiss the indictment?

MS. RINGLER: That's correct, Your Honor.

[16] THE COURT: Of Count One, excuse me.

MS. RINGLER: We reserve the right to do that.

THE COURT: And reverse the right to do that.

BY THE COURT:

Q Do you understand that's the situation, Mr. Braxton?

A Yes, sir.

Q Okay. But it's up to them, but, Mr. Cribari, I am glad you mentioned that. I was going to raise that myself. And you understand that if the Government does move to dismiss that Count One, it will be entirely up to me whether to grant that motion. Do you understand that?

A Yes, sir.

Q Now, as I'm sure Mr. Cribari has gone over with you, this case is subject to what are called the sentencing guidelines. Do you understand that?

A Yes, sir.

Q Now, let me just go over with you in broad outline what these are all about to make sure you understand them. And counsel, if there's anytihng you think I ought to add, go ahead and tell me.

Now, Mr. Braxton, you understand that the way these —what these guidelines are is that they are so-called sentencing guidelines, and they're put out by an outfit, by an organization, called the United States Sentencing Commission. Do you understand that?

[17] A Yes, sir.

Q And what guideline is applicable to a specific case depends upon the nature of the case, the nature of your involvement in the case, the nature of the offense, your criminal history, if any; a variety of factors determine what guidelines should apply. Do you understand that?

A Yes, sir.

Q And you understand that I make certain findings to determine what guidelines apply, but after I've made those findings, I have to sentence you within those guidelines unless I find a specific reason to depart from the guidelines. Do you understand that much before I get too complicated?

A Yes, sir.

Q And do you understand that in order to depart, I'd have to find—that is, to go under the guidelines or over the guidelines—I'd have to find some reason, and state it, that I believe should apply in your case that the sentencing commission had not properly considered. Do you understand that?

A Right. Yes, sir.

Q And you understand that if I sentence under the guidelines, you could appeal my sentence—excuse me. If I sentence under the guidelines—I guess you could, but I doubt if you'd want to—a sentence under the guidelines,

[18] the Government could appeal. Now, if I sentenced over the guidelines, you could appeal. Do you understand that?

A Yes, sir.

Q And also, I think, I should add that you could also —the law is not entirely clear on this, but in terms of— if I make findings which cause a particular guideline to be imposed and you think I made a mistake in that in some respect, you could appeal that, too. Do you understand that? If I made some finding as to what guide— which makes one guideline applicable, and you think I'm wrong about that, you could appeal that, as well. Do you understand that?

A Yes, sir.

Q And the Government, presumably, could do the same thing. Do you understand that? That if the Government disagreed with some finding that I made and said I applied the wrong guideline, they could appeal my finding. Do you understand that?

MR. CRIBARI: Your Honor, let me explain on the record the way I explained this to Mr. Braxton. What I told him was that his sentence—and we're really, I suppose, only talking about the sentence on the assault count because the other is a mandatory maximum minimum statutory—his sentence would be determined by Your Honor after the Pre-Sentence Investigation Report from Mr. Feldman—and that under the Federal Sentencing Law, you would consider on one [19] hand Mr. Braxton and his background, and on the other hand the nature of the offense, and that the law provided for an area where those two considerations met. And that once you determined where that area was, you had to sentence within that area. If you didn't, and we felt that what you did was sentence him illegally under the guidelines, we could appeal that. And that if the Government thinks you sentenced illegally under the guidelines, the Government could appeal that. And that, while he gives up his right

to appeal from the sentence if we determine, or if we think, the sentence might be illegal. I have not gone into greater detail about the way the guidelines work because I didn't think that it was fruitful to do that.

THE COURT: I think that's a fair statement.

BY THE COURT:

Q Mr. Braxton, do you understand that? Is that what Mr. Cribari told you?

A Yes, sir.

Q And you understand what he's told you? And you understand that?

A Yes, sir.

Q All right. I think, basically, that's right. When it all comes down, if you think I've made a mistake in applying or determining these factors, then you can appeal my [20] sentence. Do you understand that?

A Yes, sir.

Q Or the Government can appeal the sentence if they think I've made a mistake. Do you understand that?

A Yes, sir.

THE COURT: I need to be satisfied, also, that there's a factual basis for your entry of the plea of these two counts. And Ms. Ringler, I'd ask you to state the facts that the Government would be prepared to prove if the case went to trial.

MS. RINGLER: Thank you, Your Honor. The Government would prove that on September 16th, 1974, Mr. Braxton was confined to St. Elizabeth's Hospital in Washington, D.C. pursuant to a U.S. District Court order that he was found not guilty by reason of insanity on a charge of bank robbery in that district. In connection with that offense, Mr. Braxton was involved in a shootout with members of the Metropolitan Police Department.

On or about May 12, 1988, the U.S. Marshal Service for the District of Columbia received an arrest warrant charging Mr. Braxton with unauthorized leave from St. Elizabeth's Hospital.

The evidence would show that on June 9th, 1988, Deputies Jenkins and Williamson responded to 4301 Eastern Avenue, Apartment 3, in Mt. Rainer, Maryland, and verified [21] that Thomas Braxton was residing at that address.

The following day, on June 10th, 1988, at approximately 7:00 a.m., four Deputy U.S. Marshals named Sherry, Corruthers, Kelly and Jenkins went to Mr. Braxton's address at 4301 Eastern Avenue and confirmed that Mr. Braxton resided at Apartment Number 3. At approximately 7:00 a.m., Deputy Jenkins knocked on Apartment 3 and received no response; however, he could hear movement coming from inside the apartment. Deputy Jenkins again knocked, identified himself as a United States Marshal, and advised Mr. Braxton that he had a warrant for his arrest. Again, there was no response from Mr. Braxton. At approximately 7:30 a.m., Deputy Jenkins unlocked the door with keys that had been provided to him by the maintenance staff at the apartment building. Deputy Jenkins again knocked, identified himself as a United States Marshal, and announced his purpose in being there. Deputy Jenkins, who was standing directly in front of the apartment door, opened the door and found that there was a security chain locking it, and so he could only crack it open. At that point, Deputy Jenkins kicked the door open, and contemporaneous with the door opening, a gunshot was fired through the door opening. The gunshot lodged in the front door just above the doorknob. That's the outside of the front door. The four Deputy U.S. Marshals were all located either in front of or next to the front door which [22] had been opened and through which the gunshot had been fired. After several moments, Deputy Jenkins again announced himself, and kicked the door open. The door had snapped shut between the first two attempts to open it. When he kicked it open a second time, a second gunshot was fired again through the door opening. The second bullet lodged approximately five feet high in the door; that's

from the floor up to the ceiling. And it was located in the middle of the door about where Deputy Jenkins had been standing.

The U.S. Marshals then withdrew to a cover position. After firing the shot, the Defendant stated that he was not coming out, that he did not want to go back, and that if the U.S. Marshals came inside, he would kill them or blow their head off. Additional U.S. Marshal units were requested and P.G. County Police were called. The area was barricaded and secured with the evacuation of nearby buildings, and the Prince Georges County Emergency Response and Crisis Intervention Team took over. When the Intervention Team arrived, Mr. Braxton was again asked to leave the apartment to which he yelled that he was not coming out. He stated to the Crisis Team that, "I want you to come in and get me. I want to kill you." At least two additional shots were fired after the arrival of the Crisis Intervention Team. The Government would not be producing any evidence that those shots were filed at anyone.

[23] At approximately noon, Mr. Braxton was forcibly removed from his apartment with tear gas. Seized from him was Smith and Wesson 38 caliber six-shot revolver with a two-inch barrel containing four expended 38 caliber shells. Two shell casings were actually found in the apartment. A forensic expert analyzed the bullets lodged in the door and found that they were consistent with the gun seized from Mr. Braxton.

After being advised of his Maranda rights, Mr. Braxton stated that he knew United States Marshals were knocking on his door, and he fired at them because he did not want to return to St. Elizabeth's Hospital. And that would be the substance of the Government's case.

MR. CRIBARI: Can I have a moment, Your Honor, please?

THE COURT: Yes.

(Discussion off the record.)

MR. CRIBARI: Your Honor, we would agree that Ms. Ringler's statement of facts is accurate; however, Mr. Braxton's best recollection is that the two bullets that hit the door were fired at the same time, not at different times. I'm not sure that matters for purposes of the plea, but that's his recollection.

THE COURT: But that's his recollection.

MR. CRIBARI: And I believe that when Ms. Ringler [24] says that a Smith and Wesson was recovered from Mr. Braxton, in fact, it was recovered in the apartment after he had come out of the apartment and had been taken into custody. I don't think he walked out with the gun.

THE COURT: Do you know that, Ms. Ringler?

MS. RINGLER: Your Honor, it was recovered from the apartment. I would add to the Government's statement the fact that Mr. Braxton was the only person in the apartment at the time that he was actually arrested. So it was found on the floor in the apartment near the shell casings which were also recovered.

THE COURT: Now, Mr. Braxton, if you would stand. With those modifications stated by Mr. Cribari and Ms. Ringler, did what the Government say that it could prove happened, is that what happened?

THE WITNESS: Yes, sir.

THE COURT: And you admit that you did what the Government says it could prove you could do?

THE WITNESS: Yes, sir.

THE COURT: Well, I find that there is a factual basis for you to enter the plea. I find that you are entering the plea voluntarily, completely voluntarily, knowing, essentially, that there is no plea agreement. There was a discussion about the dismissal of Count One which we went over before. But there is no plea agreement, and you [25] understand that. I understand that you understand the rights that you're giving up by pleading guilty, and that you're voluntarily doing that. You understand the charge against you and the penalties to

which you are subject. I also find that you are competent to enter your plea. Perhaps we ought to have some statement on the record, Mr. Cribari, as to was there any competency determination? I think we should go over that.

MR. CRIBARI: Your Honor, I first met Mr. Braxton on August 19th of last year at the arraignment on this case. At that time, it became evident to me that he was living at St. Elizabeth's, and it became evident to me, essentially, what the case was about. Subsequent to that, I had Dr. Neal Blumberg evaluate Mr. Braxton for both competency and a possible insanity defense. In connection with that, Dr. Blumberg talked to Mr. Braxton on several occasions, talked to me, talked to the public defender lawyer who serves at St. Elizabeth's who has represented Mr. Braxton in the past, and reviewed all of Mr. Braxton's medical records which I obtained from St. Elizabeth's and which are in three volumes approximately two and a half inches thick. I will provide all those documents to Mr. Feldman as part—and the Government—as part of the Pre-Sentence Investigation Report. Based on Dr. Blumberg's analysis, and based upon my own researches and my own discussions with Mr. Braxton, there [26] is no competency problem, especially since he takes the medicine and he's been living at St. Elizabeth's, and that there was no possible insanity defense that could be meritoriously be put forward under the new law. I have no illusions that if we were under the old law we may well have one. But under the new law, I don't think we have an insanity defense, and frankly, could not find a doctor who would put it on.

And I am satisfied in my own dealings, and also in Dr. Blumberg's report, that Mr. Braxton is competent. I've never had any trouble with him understanding what's going on. I know he has written the Court on some occasions. And while Mr. Braxton's abilities as a letter writer may not be the most brilliant in history, he certainly can communicate. He's communicated with

me in writing, over the telephone, and in person, and I have not had any difficulties dealing with him.

THE COURT: And while you're on your feet, just let me ask, I noticed and I had forgotten, that there had been a motion to suppress statements from that—

MR. CRIBARI: I'll withdraw any motions that we filed in this case, Your Honor.

THE COURT: And you've been over those with Mr. Braxton? He understands that by pleading guilty he's giving up any right to pursue the matters set forth in the motion?

[27] MR. CRIBARI: Yes, Your Honor. He knows the only possible appellate relief from here will be on an illegal sentence.

THE COURT: You understand that, Mr. Braxton? By pleading guilty, you're giving up any motions to suppress, or anything of that nature. Do you understand that?

THE WITNESS: Yes, sir.

THE COURT: Well, I just said before that I made a finding of competency. I didn't mean that. I had heard informally of Dr. Blumberg's report. I now make a finding, and knowing that and having observed that, I tentatively made the finding. I now make that finding based upon the representations of Mr. Cribari. Based upon what was said and my own observation of you, it's clear to me that you fully understand what's going on and the effect of everything going on today, that I do find that you are fully competent to enter the plea. So, I also make that finding.

Now, before I decide whether or not to accept the plea, counsel, do either of you know of anything else I should take up with Mr. Braxton?

MR. CRIBARI: Your Honor, the only thing I would add is something Ms. Ringler and I have discussed in the past, and that's the determination of the guideline that will be appropriate. I, frankly, don't think we need go into great detail. I have explained to Mr. Braxton

what I've told [28] you, that Your Honor can sentence Mr. Braxton up to 10 years in jail on that offense. That it's up to Your Honor to determine the sentence, but that to a large extent, the sentence will be governed by the guideline.

Mr. Braxton and I, and also, myself with Ms. Murdock and Mr. Segretti from my office—we've had several meetings—had lengthy discussions at which we concluded what a jury might and might not do, and what the sentencing judge might and might not do. Of course, there is lurking in the background the allegation of an attempted murder. You can gather from Mr. Braxton's position, and probably from Ms. Ringler's statement of facts, that Mr. Braxton admits he assaulted someone and used a handgun, but, obviously, is not admitting he attempted to specifically murder anyone.

Nevertheless, we've explained to Mr. Braxton that you're going to consider all of these facts in determining a sentence, both considering them under the guideline to determine the guideline, and considering them for any departures under the guideline. That you could depart upward if you think he tried to murder the marshals. You could conceivably depart downward if you thought he didn't know what he was doing, or that there was a reason to do that. But that, it's sort of open season on sentencing, as it were, although within the procedures outlined by the guidelines.

I state that so that Mr. Braxton can hear me state [29] that, so that the Court can hear me state that, and I think so that Ms. Ringler can hear me state that.

THE COURT: All right. Anything further to add?

MS. RINGLER: No, I'm satisfied with that, Your Honor.

THE COURT: Well, that's fine. Mr. Braxton, that's basically right in terms of sentencing in this case. It's now going to be within the framework, and I certainly fully intend to comply with the guidelines and what I understand to be their nature and effect. Within their

framework, it's going to be up to me. Do you understand that?

THE WITNESS: Yes, sir.

MR. CRIBARI: Mr. Braxton—

THE COURT: And then, I would hope what I'm going to get from counsel on each side is memoranda delineating—short memoranda. I don't want—you don't have to write me a thesis, but a short memorandum before sentencing basically outlining your basic position.

MR. CRIBARI: Your Honor, we will do that. Now, Mr. Braxton has on numerous occasions told me he wants to make a statement to the Court, and I've advised him that that's appropriate at sentencing. So I tell Your Honor that at sentencing Mr. Braxton will, indeed, make his statement as to what he did, and why he did it, and so on. But that right now, since you're not determining sentence, it would be a [30] little early for us to make such statements. He does have an explanation that he wants Your Honor to hear.

THE COURT: I'd be glad to hear it from you, Mr. Braxton. I look forward to hearing from you at the time of sentencing. Of course, you won't have to say anything now, but I'd be glad to hear and fully consider whatever you have to say at that time. But Mr. Cribari is right. It would be at the time of sentencing rather than now would be the time for me to hear from you.

THE WITNESS: Could I say something right now, Your Honor?

THE COURT: Well, I guess you have a right to.

THE WITNESS: I want to take that plea back. I want to take that plea back. I want to move my mouth. I want Mr. Cribari to talk for me.

THE COURT: I'm sorry?

MR. CRIBARI: May I have a moment, Your Honor, please?

THE WITNESS: I want Mr. Cribari to talk for me.

THE COURT: Oh, at sentencing?

THE WITNESS: Yeah.

THE COURT: Well, that would be fine. You won't have to say a thing at sentencing. It will be entirely up to you. As I say, I'll be glad to hear from you if you want to. I'll be glad to hear from Mr. Cribari on your behalf, and I [31] certainly am not going to hold it against you that you don't say anything. Do you understand that?

MR. CRIBARI: Okay?

THE WITNESS: (No response.)

THE COURT: Fine.

MR. CRIBARI: Thank you, Your Honor.

THE COURT: Now, I guess we ought to set a sentencing date. Now, I would think that in this case there's no real reason for the probation office to get involved in any kind of factual finding or things of that nature. You may address—I assume that counsel from both sides may be addressing their views of the facts in the memoranda, and I'll be glad to hear from you, but I don't think we have burden the probation office with any findings on that, do you Mr. Cribari?

MR. CRIBARI: I do not, Your Honor.

THE COURT: So why don't we use what are now called I think, "Type A Scheduling Orders" which means that the report can be prepared, I think, within 30 days.

MR. CRIBARI: Your Honor, I'm going to be a bit of a—excuse me, a bit of a pain here at the moment. From June 16th until June 30th, I will be on vacation out of the country. Now, I would be happy to do the sentencing prior to June 16th, or immediately in the first week of April (sic) after whatever the court holiday is.

[32] THE COURT: You mean July?

MR. CRIBARI: I'm sorry. Yes, July. The first week of July after the Independence Day Holiday, but I would not be available the last two weeks in June.

THE COURT: Well, that's fine. Under the 30 day schedule, it's really 30 days for the preparation of the report, and then, time triggers after that. So we wouldn't be doing much before—Ms. Turner, what do we actually

set? With a 30 day report, what are we looking for as a final date? About how much from now?

MS. TURNER: It's 30 days from when the report is in, it's 14, then 11, then five.

THE COURT: So what's that add up to?

MS. RINGLER: You're in the middle of July, I think, Your Honor.

THE COURT: Fourteen, eleven, five and thirty? Do we all come up with 60?

MS. RINGLER: Yes.

THE COURT: 60 days.

MR. CRIBARI: Your Honor, can I suggest the afternoon of Thursday, July 20th, unless that's too early, or earlier than that. I tend to think the earlier the better.

THE COURT: Oh, I agree. And if you all want to waive some of those time filings, we can make it earlier than that, if you want. I mean, a lot of this time has to be [33] built in to respond to the report.

MR. CRIBARI: Your Honor, I will—as long as I'm not in the position of having to respond between June 16th and June 30th, I'll respond the day I get the report from Mr. Feldman. I don't need two weeks to respond. I know—

THE COURT: Well, rather than enter one of those—and you'd be willing to waive any rights that you may have under the guidelines, or whatever, for response times?

MR. CRIBARI: Oh, sure.

THE COURT: Okay. Well, rather than enter an order, why don't we set a sentencing date, say, during the week of July 10th of some kind.

MR. CRIBARI: That's fine, Your Honor.

THE COURT: Now, if at some point an issue comes up that you all think needs to be responded to in the report—

MS. RINGLER: We can just advise the Court.

THE COURT: —advise me and we'll reset it.

MR. CRIBARI: That's fine, Your Honor.

MS. RINGLER: That's fine.

THE COURT: Why don't we try to set it at—

MR. CRIBARI: I think the afternoon is better for the marshals since they have to go to St. Elizabeth's.

THE COURT: Four o'clock on, how about July 10th?

MS. RINGLER: That sounds fine, Your Honor.

MR. CRIBARI: Which day, Your Honor?

[34] THE COURT: July 10th; is that all right, Mr. Marshal?

THE MARSHAL: That's fine, Your Honor.

MR. CRIBARI: That's fine, Your Honor. And if there's any reason to change that, I'm sure we'll let you know ahead of time.

THE COURT: Sure. Okay. I'm not sure I ever accepted the plea. I accept your plea of guilty to Counts Two and Three, Mr. Braxton.

THE WITNESS: Thank you, Your Honor.

MR. CRIBARI: Your Honor, I think you accepted the plea at exactly 4:38. Thank you, Your Honor.

THE COURT: All right. Okay. Sentencing—wait a second. I just want to write this down. All right. Thank you all very much. I'll stand in recess.

THE CLERK: Please rise. This Honorable Court now stands in recess.

(Proceedings concluded.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

(Title Omitted in Printing)

PRESENTENCE REPORT

Prepared For:	The Honorable J. Frederick Motz United States District Judge
Prepared By:	Richard L. Feldman, L.C.S.W. Senior U.S. Probation Officer (301) 962-4964
Sentencing Date:	July 10, 1989
Offense:	Assault on a Federal Officer in violation of 18:USC:111 (Count Two) and Use of a Firearm During A Crime of Violence in violation of 18:USC:924(c).
Release Status:	Arrested on June 9, 1988 and given an initial appearance before the Honorable Paul M. Rosenberg, U.S. Magistrate on August 19, 1988. The defendant was ordered detained.
Identifying Data:	
Date of Birth:	July 1, 1949
Social Security No.:	577-64-9404
Address:	St. Elizabeth's Hospital Howard Pavilion 2700 Martin Luther King, Jr. Avenue, S.E. Washington, D.C. 20032
Detainers:	Court ordered mental health commitment.
Associate Defendants:	None.
Assistant U.S. Attorney Susan R. Ringler Assistant U.S. Attorney U.S. Courthouse 8th Floor 101 W. Lombard Street Baltimore, MD 21201 301/962-4822	*Defense Counsel* Steven Cribari, Esquire Deputy Federal Public Defender 612 Mercantile Bank & Trust Bldg. 2 Hopkins Plaza Baltimore, MD 21202 301/962-3962
Date Report Prepared:	
Revised:	
Disposition:	

PART A. THE OFFENSE

Charge(s) and Conviction(s)

1. On May 22, 1989, the defendant appeared with appointed counsel before the Honorable J. Frederick Motz, in the U.S. District Court for the District of Maryland and entered pleas of guilty to Assault on a Federal Officer (Count Two) in violation of 18:USC:111 and Use of a Firearm During a Crime of Violence in violation of 18:USC:924(c). Another count (Count One), charging the defendant with Attempted Murder remains outstanding. There is no plea agreement in this case. The defendant was ordered to remain in custody and a presentence investigation was ordered pending sentencing on July 10, 1989.

2. Since the offense took place after November 1, 1987, the Sentencing Reform Act of 1984 is applicable.

Related Cases

3. None.

The Offense Conduct

4. The following Statement of Facts was supplied by the Assistant U.S. Attorney in this matter:

5. "On or about September 16, 1974, the defendant, Thomas Braxton, was confined at St. Elizabeth's Hospital, John Howard Pavilion, in Washington, D.C., pursuant to a U.S. District Court Order after he was found not guilty by reason of insanity on a charge of bank robbery in violation of 18 U.S.C. Section 2113(a). In connection with this offense, Mr. Braxton was involved in a shootout with members of the Metropolitan Police Department.

6. "On or about May 12, 1988, the U.S. Marshal's Service for the District of Columbia received an arrest

warrant charging Thomas L. Braxton with unauthorized leave from St. Elizabeth's Hospital.

7. "On June 9, 1988, Deputies Jenkins and Williamson responded to 4301 Eastern Avenue, Apt. 3. Mt. Rainier, Maryland, and verified that Thomas Braxton was living at that address. The following day on June 10, 1988 at approximately 7:00 a.m., Deputy U.S. Marshals Shealey, Carruthers, Kelley and Jenkins responded to 4301 Eastern Avenue. At that time, it was confirmed that Thomas Braxton was in Apt. 3. Deputy Jenkins knocked again, identified himself as a U.S. Marshal, and advised the defendant that he had a warrant for his arrest. Movement could be heard inside the apartment but there was no response.

8. "At approximately 7:35 a.m., Deputy Jenkins unlocked the door with keys that had been provided to him by the maintenance staff. Deputy Jenkins again knocked, identified himself and announced his purpose. Deputy Jenkins, who was standing directly in front of the door, opened the door as far as the chain locking device would allow, and then kicked it open. Coinciding with the door's opening, a gunshot was fired through the door opening which lodged in the door just above the door knob. The shot was fired in the direction of four U.S. Marshals who were located in front of and next to the front door and were visible through the door opening. After the first shot was fired, the door snapped back. Several moments later, Deputy Jenkins again announced himself and kicked open the door. A second gunshot was fired again through the door opening and a bullet hole was observed in the mid-portion of the outside of the door at the level of Deputy Jenkins' chest and head. After firing the shots, the defendant stated that he was not coming out—he did not want to go back and if the U.S. Marshals came inside, he

would kill them/blow their heads off. The U.S. Marshals withdrew to a cover position and secured the area. Additional U.S. Marshal units were requested as well as uniformed support from Prince Georges County.

9. "The area was barricaded and secured with the evacuation of nearby buildings. The Prince Georges County Emergency Response & Crisis Intervention Team took over. When the Crisis Intervention Team arrived, the defendant was asked to leave the apartment, to which he yelled that he was not coming out. He stated: "I want you to come in and get me. I want to kill you." At least two additional shots were fired after the arrival of the Crisis Intervention Team.

10. "At approximately noon, the defendant was forcibly removed from the apartment with tear gas and he resisted arrest. The defendant had been alone in the apartment. Seized from the living room floor of Mr. Braxton's apartment was a Smith & Wesson .38 cal. 6 shot revolver with a 2-inch barrel containing four expended .38 cal. shells. Two expended shell casings were found on the living room floor. The two bullets lodged in the front door were consistent with the .38 cal. gun seized from the defendant's apartment.

11. "After being advised of his *Miranda* rights, Mr. Braxton stated that he knew U.S. Marshals were knocking on his door, and he fired at them because he did not want to return to St. Elizabeth's Hospital."

12. Contact with the victims in this matter was attempted. Unfortunately, only one victim, Deputy U.S. Marshal Mark Shealey responded. Mr. Shealey indicated that no injury occurred.

13. Restitution does not appear to be an issue in this case.

14. The defendant, upon advice of counsel, refused to discuss the instant offense.

Adjustment for Obstruction of Justice

15. This officer does not have any information suggesting that the defendant impeded or obstructed justice.

Adjustment for Acceptance of Responsibility

16. Though the defendant pled guilty in this offense, no statements were made indicating that the defendant accepted responsibility.

Offense Level Computation

17. Base Offense Level: The guidelines for 18:USC:111 are found in Section 2A2.2. Section 2A2.2 provides that the base offense level for this offense is 15.

18. Since there is no plea agreement as to the stipulation in this matter, the Government has indicated that the Court should apply a higher base offense level for the more serious offense of Attempted Murder pursuant to Sentencing Guidelines Section 1B1.2. During the plea of guilty in this matter, the defendant did not disagree with the Statement of Facts read in open Court by the Government. The facts of this case appear to substantiate that the defendant attempted to kill the U.S. Marshals in the performance of their duty. It is believed, that Mr. Braxton should be sentenced under the appropriate guidelines relevant to the more serious offense of Attempted Murder. The base offense level for Attempted Murder of a U.S. Marshal, 18:USC:1114, is 20 as found in Section 2A2.1. 20

19. Specific Offense Characteristics: None. 0

20. Adjustment for Role in the Offense: None. 0

21. Victim Related Adjustment: The victims in this matter were federal officials and therefore an adjustment of three points needs to be added pursuant to Section 3A1.2. 3

22. Adjustment for Obstruction of Justice: None. 0

23. Adjusted Offense Level (Subtotal): 23

24. Adjustment for Acceptance of Responsibility: The defendant made no statements indicating that he accepted responsibility for this offense. 0

25. *Total Offense Level* 23

PART B. THE DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudications

26. None.

Criminal Convictions

27. Maryland Rule 719 or Rule 4-213 entitles all defendants to notice of the right to be represented by counsel and to have counsel appointed if indigent for all felony charges since September 1, 1967 and for all lessor offenses since July 1, 1977.

	DATE OF ARREST	*CHARGE/DISPOSITION/ GUIDELINE*	*SCORE*
28.	11/10/78 (age 29)	Superior Court of Washington, D.C. Possession of Prohibited Weapon and Reckless Driving. Defendant sentenced to two years probation, to run concurrent, on each charge. Defendant stated he was represented by a Public Defender.	1

29.	7/4/87 (age 38)	Superior Court of Washington, D.C. Theft (reduced to Shoplifting), 30 days confinement. Defendant indicated that he was represented by counsel.	1

Criminal History Computation

30. The criminal convictions result in a subtotal criminal history score of 2. 2

31. The total of the criminal history points is 2. According to the sentencing table (Chapter 5, Part A) 2 or more criminal history points establish a criminal history of Category II.

Other Criminal Conduct

32. Mr. Braxton was arrested for possession of narcotics on January 30, 1971 in Washington, D.C. and given a sentence of 90 days incarceration on March 22, 1971. Furthermore, Mr. Braxton was arrested on January 11, 1973 and charged with Carrying a Deadly Weapon in violation of the Bail Reform Act, both of which occurred in Washington, D.C. On the carrying a deadly weapon charge, Mr. Braxton received 1-4 years confinement, suspended, 100 days incarceration with five years probation. Also, he received a sentence of 6-18 months on the Bail Reform Act, suspended, with two years probation, concurrent. Since the previous convictions were at least fifteen years before the commission of this offense, no points were added. Finally, it is noted that the defendant was found not guilty by reason of insanity on a charge of Bank Robbery which occurred in 1973 and he was subsequently committed to St. Elizabeth's Hospital for mental health treatment due to a psychiatric problem (see Mental and Emotional section).

Pending Charges

33. None.

PART C. SENTENCING OPTIONS

Custody

34. Statutory Provisions: The maximum term of imprisonment for Assault on a Federal Officer is 10 years imprisonment. 18:USC:111.

35. Statutory Provisions: The maximum term of imprisonment for Use of a Firearm during a Crime of Violence is five years, consecutive to any other sentence. It appears that this is a mandatory five years. 18:USC:924(c).

36. Guideline Provisions: Based on the total offense level of 23 and a criminal history category of II, guideline and imprisonment range is 51-63 months as to count 2.

Supervised Release

37. Statutory Provisions: If a term of imprisonment is imposed, the Court may impose a term of supervised release of not more than three years for both offenses pursuant to 18:USC:3583(b)(2).

38. Guideline Provisions: The Court should order a two to three year term of supervised release to follow if a sentence of imprisonment of more than one year is imposed. 5D3.1(a) and 5D3.2(b)(2).

Probation

39. Statutory Provisions: For a felony, not less than one year nor more than five years, as to each count, pursuant to 18:USC:3561(b)(1).

40. Guideline Provisions: Since the lower end of the guideline range applicable in this case is 51 months, the defendant is ineligible for probation. Section 5B1.1 and 5C2.1(f).

PART D. OFFENDER CHARACTERISTICS

Family Ties, Family Responsibilities, and Community Ties

41. Defendant Thomas Braxton was born on July 1, 1949 in Washington, D.C. to the union of Audrey Braxton and Thomas T. Braxton. As the third of four children, Mr. Braxton claims to have enjoyed an average childhood. Both parents were employed and the defendant indicates that he did not lack for emotional nor financial care. There is no evidence that the defendant suffered from any emotional trauma while growing up and he claims to have matriculated from high school at the appropriate age. After graduating from high school he at first obtained employment but later attended Winston Salem State College, according to him, on a football scholarship. After approximately a year, he entered the army and was Honorably Discharged around 1971.

42. The defendant's mother was interviewed during the course of this investigation. Mrs. Braxton verified the above information yet offered little insight into the personality of her son. She did indicate that her son has had a long history of mental illness and that the instant offense occurred because of his failure to report to St. Elizabeth's Hospital. She reflected support for him in his current predicament and hoped that he would not be sentenced harshly.

43. The defendant claimed that he was married in 1968 to Sherry Lanier yet no children resulted from this relationship. He denies paternity of any other children. It is noted, however, that the defendant's mother stated that he has never been married and there is no indication of any marital history in the voluminous information released from St. Elizabeth's Hospital.

Mental and Emotional Health

44. Reports from St. Elizabeth's Hospital and a psychiatric evaluation performed by Dr. Neil Blumberg, M.D. were reviewed. According to these reports, the defendant first received psychiatric treatment at the age of 12 in 1961 when he was charged with Theft and committed to St. Elizabeth's Hospital. He has said to have additionally received psychiatric treatment in 1967 while treated at Howard University Hospital for headaches. Psychiatric treatment was also received by the defendant while he served in the U.S. Army. Mr. Braxton indicated that this treatment was a direct result of excessive drug abuse.

45. Mr. Braxton was arrested for Bank Robbery in 1972 and later found not guilty by reason of insanity on September 16, 1974. The sentencing Court, the Superior Court for Washington, D.C., committed the defendant to St. Elizabeth's Hospital because of his mental condition. The defendant was originally diagnosed as suffering from schizophrenia, chronic undifferentiated type. Since that time the defendant has remained a patient of St. Elizabeth's Hospital although he has been released at various intervals on conditional release status. While on conditional release Mr. Braxton was obligated to report for therapy to the outpatient department (OPD) and receive psychotherapy as well as medication. It is noted that the defendant applied for release from his conditional release status yet this was denied at one point. While on conditional release Mr. Braxton failed to report for outpatient treatment and the Court was requested to issue a warrant for Mr. Braxton's arrest due to his failure to report to the outpatient department. In this regard the U.S. Marshal's attempted to serve a warrant and the instant offense occurred.

46. Mr. Braxton is currently residing in Ward 12 at the Howard Pavilion within the complex of St. Elizabeth's Hospital. His diagnosis of schizophrenia remains current and he is receiving Thorazine daily. Contact with Mr. Walter Taylor, Ward Administrator, reflects that Mr. Braxton is participating fully in ward activities and has been cooperative since his arrest in this matter. Mr. Taylor indicated that the defendant has been unrealistic as to his future plans considering his arrest in this matter and has also evidenced some fantasy thinking with regards to employment possibilities. However, he noted that Mr. Braxton has been active as a recreational counselor and a ward representative of other patients.

47. In interviewing the defendant it appeared that he evidenced some delusional thinking by noting that he had a long-standing employment history as an undercover officer for various federal agencies. Furthermore, he stated that he served in Vietnam and had also received a degree in criminal psychology while residing as a patient at St. Elizabeth's Hospital. None of the previous appears to be accurate. It is further noted that Dr. Blumberg, in his second interview conducted in October, 1988, noted that the defendant exhibited other examples of delusional thinking including that he was a professional athlete involved in the Olympics and had received a doctorate in Criminal Psychology from Federal City College. Mr. Braxton had also indicated to Dr. Blumberg that he had married at the age of 7. Dr. Blumberg's opinion was that the defendant suffered from schizophrenia, undifferentiated type, chronic and that his illness was characterized, at times, by flattened affect and persecutory and grandiose delusions. Dr. Blumberg opined that the defendant committed the instant offense because of his reluctance to return to the hospital and not necessarily because of his delusional thinking.

Physical Condition, Including Drug Dependence and Alcohol Abuse

48. The defendant is 5'11" tall and weighs approximately 175 pounds. Mr. Braxton indicates that he smokes approximately two and one-half packs of cigarettes a day, yet is in perfect physical condition. Though the defendant originally stated that he did not use drugs or alcohol, he later indicated that he has had a cocaine problem for the last 17 years. He has also admitted to snorting heroin.

Educational and Vocational Skills

49. Information found in the defendant's files in St. Elizabeth's Hospital reflects that he graduated from Dunbar High School in 1967 and later attended Winston State College on an athletic scholarship. There is also some indication that the defendant attended Federal City College. However, Mr. Braxton has indicated that he has obtained a diploma from Federal City College now known as the University of the District of Columbia, and also received a related degree while residing as a patient at St. Elizabeth's Hospital.

Employment Record

50. Mr. Braxton has indicated that he has held only two full-time jobs. He worked for the American Red Cross as an attendant between 1982 and 1984 and later, through his veteran status, he was able to obtain a job as a messenger for the Department of the Interior between May, 1985 and August, 1987. He further indicated that this employment permitted personal use of firearms as an undercover law enforcement officer. The previous employment was verified within the outpatient records of St. Elizabeth's Hospital. However, the defendant quit his job at the Department of the Interior for unknown reasons

and has been unemployed ever since. It appears that he used money from a veteran's disability pension to pay necessary bills.

PART E. FINES AND RESTITUTION

51. *Statutory Provisions*: The maximum fine for each of these offenses is $250,000, pursuant to 18:USC:3571(b)(3), totaling $500,000.

52. A special assessment of $50 as to each count is mandatory. 18:USC:3013.

53. There appears to be no need for restitution in this case.

54. Unfortunately, only one of the victims in this matter was able to be contacted and that individual revealed no specific harm requiring additional restitution.

55. *Guideline Provisions*: The fine range for an offense level total of 23 is $10,000 to $100,000 according to 5E4.2(c)(3).

56. Subject to the defendant's ability to pay, the Court shall impose an additional fine amount that is at least sufficient to pay the cost to the Government of any imprisonment, probation or supervised release as ordered, according to 5E4.2(i). The Administrative Office of the U.S. Courts indicates that average monthly cost of incarceration is $1,210.05 while the average monthly cost of probation is $91.66 according to the Advisory dated May 11, 1989.

Defendant's Ability to Pay

57. Mr. Braxton indicates that he receives a veteran's pension of $538 per month. This amount totals approximately $6,456 per year. Should the defendant be incarcerated, it would appear that his income would be sufficient to assist in payment of his confinement.

PART F. FACTORS THAT MAY WARRANT DEPARTURE

Although the defendant may have suffered from schizophrenia, a mental illness, at the time the offense was committed, it is noted that reduced mental capacity may not be considered for departure from the Guidelines. A defendant's reduced mental capacity, as found in the Diminished Capacity (5K2.13) policy statement, reflects that this departure may only be used in consideration of a non-violent offense.

U.S. DEPARTMENT OF JUSTICE
United States Attorney
District of Maryland
Baltimore, Maryland 21201-2692

June 27, 1989

Richard Feldman
United States Probation Officer
United States Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

Re: United States v. Thomas L. Braxton
Criminal No. JFM-88-0252

Dear Richard:

I have reviewed the presentence investigation which you prepared on Thomas Braxton. This is to advise you that the government has no objection to your report. In your report, you referred to psychiatric records which you reviewed relating to Thomas Braxton from St. Elizabeth's Hospital and Dr. Neil Blumberg. Since I have not had an opportunity to review those records, I would appreciate it if you could provide me copies of the documents which you did review in preparation of your report.

I thank you for your assistance. If you should need any additional information, please do not hesitate to contact me.

Very truly yours,

BRECKINRIDGE L. WILLCOX
United States Attorney

By: /s/ Susan M. Ringler
SUSAN M. RINGLER
Assistant United States Attorney

cc: Stephen J. Cribari, Esquire

OFFICE OF THE FEDERAL PUBLIC DEFENDER
DISTRICT OF MARYLAND
Baltimore, Maryland 21201-2991

July 6, 1989

Mr. Richard Feldman
United States Probation Officer
6.100 United States Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

Re: United States of America
v. Thomas Braxton
Criminal No: JFM-88-0252

Dear Mr. Feldman:

The purpose of this letter is to memorialize the substance of our telephone conversation yesterday, July 5, 1989.

I object to your presentence investigation report in three areas: your treatment of acceptance of responsibility, victim related adjustments, and your determination of the base offense level, as contained in paragraphs 16, 21 and 18 respectively.

You are familiar with Mr. Braxton's mental history, in no small part because I provided you with extensive documentation and reports concerning that history. You are familiar with the fact that Mr. Braxton had not taken his psychotropic medication for sometime prior to the incident that is the basis of the charges in this case. You are also familiar with the fact that at the time of his apprehension and arrest, following his arrest, and during the most recent court proceeding in this case, Mr. Braxton has acknowledged what happened on the day of his arrest, admitted to those acts, and stated repeatedly, and in different ways, that he did what he did so that

he would not be taken back to St. Elizabeth's Hospital. Mr. Braxton who has freely admitted what he did, is confined to a mental institution because of severe schizophrenia. He is also overtly delusional, I do not understand how he can be denied a two level reduction for acceptance of responsibility. It's not that I did not expect you to find the way you did; but I simply do not understand it. I remind you that under guideline 3E1.1, the defendant is not automatically entitled to a two level reduction for acceptance of responsibility because he pleads guilty, but neither is he automatically to be denied such a reduction solely because he enters a guilty plea. Mr. Braxton clearly has acknowledged what he did. If he were capable of a greater demonstration of acceptance of responsibility, he would not be confined at St. Elizabeth's Hospital for the criminally insane.

Secondly, holding for a moment our discussion of the appropriate base offense level, I think you are wrong to increase the base offense level by three levels, as you do in paragraph 21 under Victim Related Adjustments. It is true, according to guideline 3A1.2, that if the victim of a crime is a law enforcement or corrections officer, the base offense level is increased by three levels. However, application note three to that section states: "Do not apply this adjustment if the offense guidelines specifically incorporates this factor." The statute which Mr. Braxton is charged with violating is 18 U.S.C. § 1114 (protection of officers and employees of the United States). This statute only applies when the victim of the offense is a federal official. Thus, to increase the maximum punishment by three levels because the victim is a federal official (and the victim could be no one but a federal official under this statute) would be to "double count." Thus, I object to the three level increase in paragraph 21.

As to your calculation of the base offense level, in paragraph 18 of your report, you indicate that you rely on guideline section 1B1.2 as your basis for using the higher offense level. Section 1B1.2 indicates that "the court shall

apply the guideline . . . most applicable to the stipulated offense." 1B1.2(a). This the court is to do in those cases where a conviction is had by a guilty plea "containing a stipulation that specifically establishes a more serious offense than the offense of conviction . . ." *Id.* In fact, in Mr. Braxton's case there is no stipulation. At the time the plea was entered, Assistant United States Attorney Susan Ringler presented to the Court a statement of facts, which the defense acknowledged. There simply was no stipulation in this case. Without a stipulation, section 1B1.2 is inapplicable. *See* section 1B1.2, Application Note one, paragraph 2.

I agree that the Court may consider the entirety of Mr. Braxton's conduct under section 1B1.4, in order to determine the appropriate sentence. Mr. Braxton pled guilty to a five year mandatory consecutive handgun charge (18 U.S.C. § 924(c)), and to assaulting and resisting federal officers under 18 U.S.C. § 111. He maintained his not guilty plea to the attempted murder charge. Given Mr. Braxton's mental condition at the time of this incident (and I remind you he had not taken his psychotropic medication for several months, which precipitated the arrest warrant which was being executed at the time of incident), and given everyone's understanding of what happened, I do not think it appropriate to conclude that Mr. Braxton attempted to murder United States Marshals. I believe it appropriate to conclude that he attempted to remain out of St. Elizabeth's Hospital. In this case, because of exactly when Mr. Braxton discharged his handgun, his actions are more consistent with a desire not to go back to St. Elizabeth's than any desire to murder anyone. In fact, he only discharged the handgun after the door to his apartment had been forcibly kicked open, and then fired at the door, not the doorway. Also, because of the location of some of the bullets found in the apartment, it can be assumed that the handgun was randomly discharged in the direction of the door, and

not at anyone in particular. Again, considering the mental state of the defendant at the time of the incident, I do not think it appropriate to conclude that he attempted to murder United States Marshals. Rather, I think Mr. Braxton was discharging his handgun to frighten away the people who were breaking down his door, because they were going to take him back to St. Elizabeth's. His were the acts of a criminally insane person who had not been taking necessary medication. No one was hurt by his actions and, as you point out several times in your presentence investigation report, other than one person, no one was interested in responding to your queries regarding this incident which, though unusual for us, is certainly not unusual for people who are assigned the task of taking custody of criminally insane persons who have a history of violent behavior and who are not taking necessary psychotropic medication.

In summation, I believe Judge Motz may take account of all of Mr. Braxton's actions when determining the appropriate sentence, when determining whether or not to depart upward or downward. However, I disagree that the base offense level is a 20, or 23. Rather, the base offense level is a 15, under section 2A2.2. Because the statute Mr. Braxton is accused of violating can only apply to a federal official, I would object to any increase under section 3A1.2.

To review, I object to your not finding acceptance of responsibility, I object to your base offense level calculation of level 20, I object to the increase of that level by three points. Rather, I believe the base offense level should be a 15 reduced by two levels, to a level 13. Assuming Mr. Braxton's criminal history is a category two, this would establish a sentencing guideline range of 15-21 months. I agree that Judge Motz may consider all of Mr. Braxton's conduct in determining where within this range to impose sentence, or whether to depart from this range upward or downward.

Lastly, on page 10 of your report, you discuss factors that may warrant a departure. You refer to section 5K2.13 and indicate that the diminished capacity of the defendant may only be used as a basis for a downward departure if the crime committed were non-violent and, as the section states, "the defendant's criminal history does not indicate a need for incarceration to protect the public." Section 5K2.13 is a policy statement and, as such, is not preemptive but merely a guide for the trial court. Section 1B1.7. Actually, I would think section 5K2.12 the more applicable to Mr. Braxton: Coercion and Duress. The section begins by stating: "If the defendant committed the offense because of serious coercion . . . or duress, under circumstances not amounting to a complete defense, the court may decrease the sentence below the applicable guideline range." This is exactly Mr. Braxton's case. He did not want to go back to St. Elizabeth's, had stopped taking his psychotropic medication, and was sufficiently mentally insane that St. Elizabeth's, who has possession of Mr. Braxton under a commitment following a not guilty by reason of insanity adjudication on an armed offense in the mid-1970's, determined he should be apprehended and returned to the institution.

I am confident that all of these issues will be resolved at the sentencing proceeding as scheduled.

Based upon our telephone conversation yesterday, it is my understanding that you are not going to change your presentence investigation report, or otherwise amend it, in light of my comments. Thus, in order to facilitate the proceeding scheduled for Monday, July 10, 1989, at 4:00 p.m., I am sending a copy of my objections to Judge Motz, so that I do not have to repeat them orally in open court. It is also my understanding, based upon our telephone conversation, that you will forward to Judge Motz all of the medical records from St. Elizabeth's and Dr. Blumberg which I have previously provided to you.

By copy of this letter, I specifically request that Judge Motz review Dr. Blumberg's report prior to sentencing.

Sincerely,

/s/ S. J. Cribari
STEPHEN J. CRIBARI
Deputy Federal Defender

SJC/mkn

cc: The Honorable J. Frederick Motz
Susan M. Ringler, AUSA

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
PROBATION OFFICE

July 6, 1989

To: Mr. Steven Cribari, Esquire (AFPD) &
Ms. Susan R. Ringler (AUSA)

From: Richard L. Feldman, L.C.S.W.
Senior U.S. Probation Officer

Subject: BRAXTON, THOMAS

Docket No.: JFM-88-0252

Sentencing Date: July 10, 1989

Disclosing Date: July 6, 1989

Dear Counsel:

The Addendum has been completed and is being forwarded to counsel pursuant to the local rule and policy of the court. A copy of the Presentence Investigation Report and Addendum is also being furnished to the court at this time. *No copy of the Addendum will be forwarded to the defendant.* It is the responsibility of defense counsel to disclose the Addendum to the client, and to thoroughly review and discuss same with the client.

If either counsel intends to call any witnesses at the sentencing hearing, they shall submit *in writing*, to the court, opposing counsel and the Probation Officer, a statement containing: (1) the names of the witnesses; (2) a synopsis of their anticipated testimony; and (3) an estimate of the anticipated length of the hearing.

The Addendum is a confidential court document. It may not be copied, reproduced, or further disclosed in any manner. Please do not write on the report. The entire

report must be returned to the Probation Officer immediately after sentencing pursuant to Rule 32(C)(3)(e) and the local policy of the court.

Thank you for your cooperation in the disclosure process.

cc: Court

Richard L. Feldman
Senior U.S. Probation Officer

ADDENDUM TO THE PRESENTENCE REPORT

U.S.A.

v.

THOMAS BRAXTON

Docket No. JFM-88-0252

The Probation Officer certifies that the presentence report, including any revision thereof, has been disclosed to the defendant, his attorney, and counsel for the Government, and that the content of the Addendum has been communicated to counsel. The Addendum fairly states any objections they have made.

OBJECTIONS

By The Government

The Government indicated no objections to the presentence report.

By The Defendant

The defendant, through his counsel, was not able to offer a written objection to the presentence report yet did indicate the following objections.

The defendant objected to the computation of the offense level at the more serious offense of Attempted Murder of a Federal Officer. Furthermore, defense counsel indicated that the defendant should not be penalized by denying two points for acceptance of responsibility because the defendant's mental state did not allow him to appreciate responsibility.

In response to the defendant's objections, the facts of the offense appear to bear out the defendant's intention to kill the U.S. Marshal in order to prevent his apprehension. The guidelines allow for the use of a higher base offense level if a plea of guilty contains a stipulation that specifically establishes a more serious offense than the offense of conviction. The Court, in this case, shall apply the guideline in such chapter most applicable to the stipulated offense. (1B1.2(a).

The essential underlying facts of the offense behavior were stated by the Government at the defendant's rearraignment and at the time that the plea was accepted by the Court. These facts were not disputed by defense counsel except for the amount of time which is said to have elapsed between the two gunshots. Given this situation, although defense counsel did not enter into a formal stipulation as to the more serious offense of Attempted Murder, the offense behavior and accepted statement of facts do weigh heavily in our recommendation that the base offense for the more serious offense be accepted.

It is noted, however, that the Court may decide not to use to the higher base offense level and use the offense of conviction in the guideline computation, should it be ruled that a stipulation does not exist as to the more serious offense or that the defendant's offense behavior does not warrant an upgrade of the base offense level.

With regards to the defendant's objection to not being given credit for a two point reduction for acceptance of responsibility, it is pointed out that defense counselor requested that the Probation Officer not interview the defendant as to the instant offense. Given this situation, the defendant provided no information demonstrating a recognition or affirmative acceptance of personal responsibility for his criminal conduct. Although a guilty plea is said to provide some evidence of the defendant's acceptance of responsibility, it does not by itself, entitle a defendant to a reduced sentence under this section.

The Probation Officer could make no evaluation of the defendant's attitude and therefore he does not appear to qualify for a reduction without demonstrating acceptance of responsibility.

The defendant, through his counsel, also requested that medical reports from St. Elizabeth's Hospital as well as Dr. Blumberg be forwarded to the Court and this will be done prior to sentencing.

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
PROBATION OFFICE

July 10, 1989

MEMORANDUM

To: The Honorable J. Frederick Motz
U.S. District Judge

From: Richard L. Feldman, L.C.S.W.
Senior U.S. Probation Officer

Re: U.S.A. v. Thomas Braxton
Criminal No.: JFM-88-025
RESPONSE TO DEFENSE COUNSEL
MEMORANDUM

It is my understanding that the Court was sent a memorandum by defense counsel in the above matter, Steven J. Cribari, in explanation of three areas of objection in the presentence report. Most of the areas discussed by Mr. Cribari were dealt with in the Addendum to the Presentence Report, yet one area is new and I have the following to add.

Defense counsel indicates that the defendant was given three points in Paragraph 21 under Victim Related Adjustments and he concludes that this was improper. As justification for his opinion, Mr. Cribari reflected that the defendant was found guilty of 18:USC:1114 which, as a statute, already takes the victim, as a federal official, into consideration. However, a review of the guideline itself in Section 2A2.2, (Aggravated Assault) or 2A2.1 (Assault With Intent to Commit Murder), reveals that none of the specific offense characteristics in these categories include an adjustment if the victim is a federal official. In fact, the guidelines are set up so that points are subsequently added to the base offense level when

appropriate victim related adjustments are calculated. In effect, the statute under which Mr. Braxton is charged is clearly separate from determining the appropriate victim related adjustments unless the maximum punishment exceeds the statutory maximum punishment allowed.

I am certainly available for any discussion on this or any other matter at the Court's convenience.

RLF:bls

CC: Ms. Susan Ringler (AUSA)
Mr. Steven Cribari (AFPD)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

(Title Omitted in Printing)

GOVERNMENT'S SENTENCING MEMORANDUM

The United States of America, by its attorneys, Breckinridge L. Willcox, United States Attorney for the District of Maryland and Susan M. Ringler, Assistant United States Attorney for said District, hereby submits this memorandum in aid of sentencing:

On August 2, 1988, a federal grand jury returned an indictment against Thomas Braxton, charging him with: Count One—attempt to murder Deputy U.S. Marshals in violation of Title 18, U.S.C. Section 1114; Count Two—assault on a federal officer, in violation of Title 18, United States Code, Section 111; and Count Three—use of a firearm during a crime of violence, in violation of Title 18, United States Code Section 924(c). On May 22, 1989, the defendant, without a plea agreement, entered pleas of guilty to Counts Two and Three of the Indictment.

On July 10, 1989, the defendant will come before this Court for sentencing as to Counts Two and Three. Since the offense for which the defendant has admitted his guilt occurred on June 9, 1988, the sentencing guidelines will apply. For the reasons stated herein, it is the government's position that under the unusual circumstances of this case pursuant to Sentencing Guideline Section 1B1.2, the Court, as to Count Two, should apply the offense guideline for attempted murder. That section provides in pertinent part:

> "The Court shall apply the Offense Guidelines Section in Chapter Two (offense conduct) most appli-

cable to the offense of conviction. *Provided*, however, in the case of conviction by a plea of guilty or *nolo contendre* containing a stipulation that specifically establishes a more serious offense than the offense of conviction, the Court shall apply the guideline at such chapter most applicable to the stipulated offense."

During Mr. Braxton's guilty plea to Counts Two and Three, Mr. Braxton essentially agreed with the statement of facts read by the government.[1] Mr. Braxton has admitted that on June 10, 1988, when four Deputy U.S. Marshals came to his apartment to arrest him in connection with an outstanding arrest warrant from the District of Columbia, he fired through the door opening as the Marshals identified themselves and attempted to gain entry into his apartment. Mr. Braxton further admitted that after firing the shots he stated that he was not coming out—he did not want to go back and if the U.S. Marshals came inside he would kill them/blow their heads off. Mr. Braxton only took issue with the facts by stating that the two shots he fired at the door were fired simultaneously.

As this Court is aware, this is not the first time that Mr. Braxton has been involved in violent conduct. Although more than ten years ago, Mr. Braxton was arrested in 1973 for carrying a deadly weapon. In 1974, he was placed in St. Elizabeth's Hospital after being found not guilty by reason of insanity on a charge of Bank Robbery. In connection with that offense, Mr. Braxton was involved in a shootout with members of the Metropolitan Police Department.

Fourteen years later, while on conditional release from St. Elizabeth's during which he was living in his own apartment and working, Mr. Braxton engages in another

[1] This Statement of Facts is contained in the report prepared by the U.S. Probation Department and therefore will not be repeated herein in its entirety.

violent act by acquiring a firearm and using it against law enforcement officers to resist arrest. While the government is not unmindful of the defendant's psychological problems, it is clear from the defendant's mental status exam performed by Dr. Neil Blumberg, that at the time of his offense, the defendant was able to appreciate the nature, quality and wrongfulness of his acts. Clearly he was not insane under the law at the time of this offense. Given the violent nature of this crime and Dr. Blumberg's assessment of the defendant's mental status, no downward departure is warranted nor permitted under the guidelines.

The conduct which the defendant has admitted to clearly establishes the essential elements of attempted murder: an attempt to unlawfully kill a deputy U.S. Marshall with malice aforethought. Malice aforethought means:

> "An intent, at the time of a killing, willfully to take the life of a human being, *or* an intent willfully to act in callous and wanton disregard of the consequences to human life."

By shooting twice through the doorway opening where the defendant knew the U.S. Marshals stood, Mr. Braxton acted in callous and wanton disregard of the consequences to the lives of those Marshals. One shot lodged in the outside of the door at the door knob level as it was opened and the second shot embedded in the outside of the door at the height of Deputy Jenkins' head as he attempted to gain entry a second time. When the efforts of the U.S. Marshals failed, the area had to be barricaded and secured with the evacuation of nearby buildings. The P.G. County Crisis Intervention Team was called in and it took them several hours to remove the defendant from his apartment. When they arrived he yelled to them: "I want you to come in and get me. I want to kill you." Two additional shots were fired inside the apartment.

The base offense level for attempted murder of a U.S. Marshal, 18 U.S.C. Section 1114 is 20 (2A2.1). While a firearm was discharged during the commission of this offense, the offense level should *not* be increased by five levels due to the fact that the defendant is also pleading guilty to a violation of 18 U.S.C. Section 924(c). *See* 2K2.4. The offense level should be increased by 3 levels since the victims were law enforcement officers (3A1.2). Contrary to Mr. Cribari's arguments, the sentencing guidelines for both sections 1114 and 111 do not take into account the special offense characteristics of the victim who is a law enforcement officer. While the statute discusses the status of the victim, the guidelines for these sections found at 2A2.1. (Attempted Murder) and 2A2.2 (Aggravated Assault) do not. Therefore, 3A1.2 should be applied to increase the offense level by 3 under both sections 1114 and 111. Therefore, under the attempted murder guidelines the total offense level is 23. With respect to Title 18 U.S.C. Section 924(c) (Count Three) a five year term of incarceration must be imposed consecutive to any term of imprisonment imposed as to Count Two.

The maximum sentence as provided by statute for the offenses to which Mr. Braxton has plead guilty are as follows:

Count Two, 18 U.S.C. Section 111—imprisonment for 10 years followed by a term of supervised release not to exceed three years, and a $250,000 fine.

Count Three, imprisonment for five years, followed by a term of supervised release not to exceed three years, and a $250,000 fine. Any sentence of imprisonment imposed under Count Three will be consecutive to any term of imprisonment imposed as to Count Two. Therefore, Mr. Braxton's total exposure in this case is 15 years, followed by a three year term of supervised release and a fine of $500,000. In addition, Mr. Braxton must pay

$100 as a special assessment under 18 U.S.C. Section 3013.

Under these facts, it is the government's recommendation that as to Count Two the defendant be sentenced pursuant to the sentencing guidelines provided for attemped murder of a U.S. Marshal. The government recommends the imposition of a five year term of incarceration as to Count Two, followed by a consecutive five year term of incarceration imposed as to Count Three. This would result in a total sentence of ten years imprisonment. The defendant should not receive the 2 points for acceptance of responsibility since it does not appear from either the Probation Report or the reports from St. Elizabeth's Hospital that he has shown any remorse nor has he recognized the wrongfulness of his actions. Based upon statements of the defendant in the medical records, it appears that Mr. Braxton feels that his actions were justified under these circumstances.

Respectfully submitted,

BRECKINRIDGE L. WILLCOX
United States Attorney

By: /s/ Susan M. Ringler
SUSAN M. RINGLER
Assistant United States Attorney
820 U.S. Courthouse
101 West Lombard Street
Baltimore, Maryland 21201
(301) 539-2940

(Certificate of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
EASTERN DIVISION

(Title Omitted in Printing)

Baltimore, Maryland
July 21, 1989

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE J. FREDERICK MOTZ
UNITED STATES DISTRICT JUDGE

* * * *

[3] THE COURT CLERK: Thank you, Your Honor. The government calls the case of the United States versus Thomas Braxton, Criminal Number 88-0252. For purpose of sentencing, it's Counts 2 and 3 of the Indictment.

THE COURT: Do you have any facts, additions or corrections to be made in the—present the Court?

MS. RINGLER: No, I don't, Your Honor.

THE COURT: Mr. Cribari, have you reviewed the present report with Mr. Braxton?

MR. CRIBARI: Yes, Your Honor, we have. I have no additions or corrections to make to that report, other than the objections I noted in my response to Mr. Feldman's report.

THE COURT: Thank you, which are incorporated.

How do you all want to proceed? Do you want to—I see Doctor Blumberg is here. Should I hear from him first?

MR. CRIBARI: Your Honor, because of the issues that I think we're going to address, I have Doctor Blumberg here essentially to answer questions, or to perhaps give opinions at the time they might become appropriate. I do not intend to put him on as a witness and let him speak outside of the context of my remarks.

[4] THE COURT: All right.

MR. CRIBARI: If you'd like to hear from him, you're free to ask him anything you want,—

THE COURT: No.

MR. CRIBARI: —but I don't intend to call him as a witness, but rather to have him answer your questions.

THE COURT: All right, that's fine. Maybe the most appropriate thing is to hear from Ms. Ringler briefly, and then hear Mr. Cribari, and then if Ms. Ringler wants to say something in response, I'll let her do it. And then, Mr. Cribari, I'll let you finish up.

MR. CRIBARI: Thank you, Your Honor.

MS. RINGLER: Your Honor, since I have already submitted a Sentencing Memorandum to the Court, I think the Court is well aware of the government's position in this case, and—

THE COURT: Is your position essentially that it should be sixty-three months—

MS. RINGLER: Our position—

THE COURT: —on the—on the Count 2, and then the consecutive five years?

MS. RINGLER: —yes, it is, Your Honor. And within that, we are arguing, of course, that although Mr. Braxton has pled guilty to the Aggravated Assault in Count 2, that under 1B1.2 of the guideline, this Court has in its [5] discretion, the power to sentence him to the guidelines put for the Attempted Murder, the higher guideline. And under those guidelines, we'd recommend the five-year sentence as to Count 2, with a consecutive five-year sentence for the Gun Charge, which is mandatory under the law. I do—I would like to just briefly address some of the points Mr. Cribari raised in his letter. With respect to whether or not Mr. Braxton should receive the additional three points here because the—

MR. CRIBARI: Your Honor, I'd submit to the court on the legal issue we raised without further argument on that particular point.

MS. RINGLER: That certainly shortens my remarks, Your Honor. We do contend, Your Honor, that Mr. Braxton is not entitled to the two point acceptance of responsibility in this case, since it appears from reviewing (I did have an opportuntiy to briefly review the medical records, which contain comments which he made after he was returned to St. Elizabeth's Hospital, as well as comments he made at the time of this incident, and to law enforcement officers) and it's apparent that Mr. Braxton does not feel that his actions were unjustified, in that he did not want to return to St. Elizabeth's Hospital. If you took that action, which he deemed appropriate, under the circumstances, to prevent or inhibit the law enforcement officers from taking [6] him back to St. Elizabeth's Hospital, I don't see anywhere in any remarks either the probation officer, medical personnel, even an interview with Doctor Blumberg, that this Defendant is remorseful, that he's sorry for what he did, or that he thinks what he did was in reckless disregard for the lives of the U.S. Marshals. It appears that Mr. Braxton continues to maintain he never intended to hurt anyone or kill anyone; he merely wanted them to go away. I would submit to the Court that it's clear from his actions, using a gun to—in response to the efforts of the law enforcement marshal, to get him to use a gun, it certainly shows reckless disregard for the lives of those officers, and I would submit that the two point acceptance of responsibility does not apply to these facts. In addition, with respect to Mr. Cribari's arguments for a downward departure, it appears that Mr. Cribari is essentially trying to argue that a diminished capacity argument, but place that argument in the Court in the context of the exception for coercion and direct, and while that's a clever argument, I find it essentially unpersuasive. I think the guidelines are quite clear as to what—under what circumstances a downward departure would be appropriate. There was no duress here. Mr. Braxton was not legally insane. He had been living out in the community for a

period of years, and he had purchased a [7] handgun, which he used in this case. I think the coercion and direct exception applies to circumstances where, through the acts of another, someone is placed under coercion and duress. In addition, the diminished capacity exception clearly does not apply where there's violent conduct, as there was here. So those would be my comments, unless the Court has any questions.

THE COURT: Thank you. Mr. Cribari?

MR. CRIBARI: Thank you, Your Honor. I'm not arguing over the three points. I'll take whatever ruling Your Honor makes. I think that my essential point was that the statute itself is addressed solely to the instance in this case, and if the guideline doesn't reflect that, the guideline should be interpreted to be in Mr. Braxton's favor, but I will not present argument on that, unless you particularly want to hear that.

THE COURT: No, thank you.

MR. CRIBARI: I assume Your Honor has Mr. Feldman's report and my letter of July 6th, that I wrote to Mr. Feldman, —

THE COURT: Yes.

MR. CRIBARI: —that you have seen Doctor Blumberg's report, you've had access to the medical records, as well as Ms. Ringler's memo in aid of sentencing and so on.

[8] THE COURT: All of those things, and I've reviewed them.

MR. CRIBARI: I—I suppose the first thing I will address is the calculation of the base offense level on the Assault Count. There's no dispute Your Honor has to give five years on the Possession of the Handgun. I know that, Ms. Ringler knows that, you know that. There's—I—there's no argument over that. 1B1.2 is a guideline that can be used where there is a stipulation in the proceedings that take place in Court, and that stipulation establishes a higher offense. We don't have that. If we're going to be specific as to how we use guidelines, then

1B1.2 does not apply. To quote from the guideline, quote, "The Court shall apply the offense guideline in—guideline section in Chapter 2 most applicable to the offensive conviction provided, however, in the case of a conviction by guilty plea containing a stipulation that specifically establishes a more serious offense than the offense of conviction." We don't have that. There is no stipulation here. This was a plea, like every other plea, where we acknowledge the statement of fact, said, that's what happened. Now, let's go to sentencing and argue over sentence. I do agree that under 1B1.3, and under the Due Process Guideline, 1B1.4, Your Honor can consider just about anything in fashioning an appropriate sentence. But [9] at what point do we start with the appropriate sentence? And I submit we start with level 15, which is the base offense level for the assault. Now, of course, my preference is to decrease that by two levels and sentence at a level 13, or to depart below that. I'm not unaware of the merits. I hate to use that word, as a defense lawyer, but I'm not unaware of the merits of the three-level aggravation because we have a federal officer. So assuming that Your Honor is going to rule on that issue against me, I would argue that we start at 15, and we increase to 18. The rest of my argument would be whether or not we now decrease by two levels and get to a level 16, which is twenty-four to thirty months, under Mr. Braxton's criminal history, as opposed to the fifty-one to sixty-three months at a level 23.

Now, as I said, I think Your Honor can consider everything known to you about Mr. Braxton and this event in giving him the sentence, but I think we start at a level 15 or 18, and then we argue over the acceptance of responsibility, concerning which I have some comments, and arrive at the very least, at a level 13—or at a level 16. Your Honor can depart to level 1, if you like, knowing everything you know. If you think you have to increase to a certain level, then you're free to do that. But I think it has to be done that way, rather than [10]

starting at a level 20 and increasing to a level 23, because we don't have the stipulation that 1B1.2 envisions.

Now, of course, at such point—or at such time as Your Honor has questions about this, please, if you want to interrupt or ask or make them at the end, I won't repeat, so I can cover everything as quickly as possible.

Arriving at a level 18, the question then is whether we reduce by two levels. This, for acceptance of responsibility. This is one of the single-most troubling aspects of this case, because I see no way not to reduce by the two levels for acceptance of responsibility. Starting with the guideline, which is 3E1.1, the guideline reads, "If the Defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by two levels." Section—sub-section B says, "This applies after trial, as well as guilty pleas in sub-section C," which is fairly important to Mr. Feldman's position, quote, "A Defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right." Closed quote. Well, that's fine. There—the guideline does not say you can't get a reduction if all you do is plead guilty. It just says you don't automatically get a reduction just because you plead [11] guilty. In my mind, this prevents the person who has been selling large quantities of drugs walking into Court and saying, "Oh, I already plead guilty," and sitting down and getting two points reduction. But that's very different than Mr. Braxton's case. Mr. Braxton has been in and out of St. Elizabeth's since he was twelve years old. Since the mid-seventies, he has been confined to St. Elizabeth's. He is still confined to St. Elizabeth's as a criminally insane resident. Now, he's not insane under this case. The insanity laws have certainly changed in the last few years, since the Hinkley trial, but Your Honor can understand the rather tense discussion Mr. Braxton and I had when I explained to him, you don't have an insanity defense. You're not insane for this case. Question: Well, why

am I in St. Elizabeth's? Answer: Because you're insane. Well, if I'm insane, why don't I have an insanity defense? Well, because you're not insane under the new law; you're insane under the old law, and you're under the old law.

Mr. Feldman, and to some extent, Ms. Ringler, when she says, quote, "Mr. Braxton does not feel his acceptance—does not feel his actions were not justified, that he showed no remorse." Mr. Feldman takes the same position. The probation office, in general, takes the position if you don't show remorse, you haven't [12] accepted responsibility. Now, I absolutely reject the fact that these guidelines and our laws are somehow tied to one's concept of moral responsibility. They may or they may not. But to the extent that the represent moral responsibility, then you have to give back an understanding of an individual because of his moral reaction. The guidelines remove that. Your Honor cannot sit there and say, because of my—I am moved by compassion, because I understand a given Defendant, and where this person is and where this person comes from, and I am moved by this person; I will give this person a certain sentence. You're not allowed to do that anymore. We've got to come up with this great guideline language for departures. But to the extent we have to do that, then there —to that extent, the laws do not reflect a concept of moral accept—righteousness, or moral responsibility. The Supreme Court takes positions like the more morally culpable you are for a murder, the more you are executable. But they don't tell us what morally culpable means. I reject the notion that if you don't show remorse, you are not accepting responsibility for what you do. I've had clients in misdemeanor cases that do 60 on the highway, 65, 80, and the go to Court and plead guilty. Can you imagine someone saying, I'm very remorseful because I was speeding. Now, if you had to do that, nobody would get reductions for [13] that. In front of Judge Ramsey, I had a client who was stopped for reasons that were

irrelevant, ultimately, to the case. May we search your trunk? We think you have contraband in there. Certainly. Opens the trunk. You've got a—a rifle. What's that? Well, that's my 22 rifle. I hunt with that. Well, you're a convicted felon; you can't have a rifle. Oh, well, I guess that's right. Well, that's my rifle. I admit it. They took the rifle. It came to Court. I admitted, this is my rifle; I hunt with it. The probation office argued no acceptance of responsibility. He's not sorry. What has he got to do? What does Mr. Braxton have to do, fall down and say, I'm so sorry for what I did? If he could do that, he would be in St. E's. He wouldn't be where we put people who cannot be responsibile for their actions. He—he's in St. E's. Now, he was given community confinement. Ms. Ringler says he was in the community for some time, and he had a period of years in the community, as if he were living in the community totally adjusted, and he was fine. He went out and bought a gun and shot at the marshals, and this is terrible. Well, what happened was terrible. But that's not the way it happened.

Mr. Braxton lives in the community, and every two weeks goes for a Prolixin injection. And at that time, receives enough Thorazine to take every night [14] until the next two weeks run out. And he goes back to St. E's and he gets another injection. He hadn't had injections or pills for two-and-a-half months. This is a man who, today, takes Prolixin and Thorazine, until they turned off the Thorazine a few days ago because he got in an altercation, and they believe it was a reaction the Thorazine. So they've increased the Prolixin. He takes daily liquid Prolixin. These are behavior-modification drugs. These are drugs for people who are committed to St. Elizabeth's because they're criminally insane and can't be responsibile for their actions. Two-and-a-half months he hasn't taken this stuff. That's why they had the warrant. That's why the marshals had to go and get it. They go—they show up at his apartment, they bang on the

door, "We're here to take you to St. E's," and the facts are clear. "I'm not going back to St. E's. You come in and get me. I'm going to kill you if you come in. I'm not going back to St. E's." So they kicked the door open, and at that time, he discharges the gun. He comes to Court, he pleads guilty, he acknowledges what he did. Now, I didn't let him talk to Mr. Feldman about the version of the offense. I—it's my routine practice that my clients don't talk to probation about that, because no matter what Mr. Braxton said to Mr. Feldman, I have no doubt what Mr. Feldman's report is going to be, because it's always the [15] same. Jacked up the numbers. So that, I stopped that one. But Mr. Braxton has talked to Doctor Blumberg. Doctor Blumberg can address his feelings, or thoughts on acceptance of responsibility. At the end of Ms. Ringler's memo in aid of sentencing, based upon state—this is, quote, "Based—" I'm sorry, let me back up. Page 5 of Ms. Ringler's memo in aid of sentencing, carrying over to page 6, "The Defendant should not receive the two points for acceptance of responsibility since it does not appear from either the probation report or the reports from St. Elizabeth's Hospital that he has shown any remorse. Nor has he recognized the wrongfulness of his actions." If he had not recognized the wrongfulness of his actions in some way, we wouldn't be here in sentencing; we'd be in trial on an insanity defense. That's the test for insanity. Because Doctor Blumberg considered he did and has recognized the wrongfulness of his actions, I can't support an insanity defense. The fact the man pled guilty in this case indicates that he recognized that what he did was wrong, and that he—and he admits to it. But I cannot see how we can deny this man, who's been in and out of St. E's since he was twelve, and has been there permanently, although with periods of community release, for the last fifteen years, how the man can come into Court, say, "I did it," and we can't give him two point [16] reduction for accepting responsibility for what he did. If we

can't give it because he can't show it, then it's not real hard as a defense lawyer to say, he can't show it, because he doesn't have it. And if he doesn't have it, I have an insanity defense, even under the new law. He had psychological treatment in the Army, when he was in the Army.

Well, I can go on over the two points for acceptance of responsibility. If your Honor has questions about whether scientifically, for a psychiatrist, Mr. Braxton can be seen as having demonstrated his acceptance—his acceptance of his responsibility for what he did, then I ask you to ask Doctor Blumberg. The problem is that Mr. Braxton may not think wanting to go back to St. Elizabeth's is wrong. I don't believe he sat there and said, I'm going to kill some marshals. Come on in. Open that door; I'm going to shoot you. I think he sat there saying, I'm not going back to St. E's. You're not taking me there. I've been there for ten years and I'm not going back. And the—the use of the gun, the explosive character of Mr. Braxton in that instance is his statement, I'm not going back to St. E's. Now, it's unfortunate that people may have gotten killed. It's extremely unfortunate. And if someone had not been in St. E's was sitting here, we'd be—we would have pled to Attempted Murder. But [17] that's not what we have, and I—Mr. Braxton, to this day, probably doesn't feel sorry about not wanting to go back to St. E's. That's not a condition for getting two points for acceptance of responsibility. If he said—if his reaction to the marshals was, well, that's all right, I haven't been there in a while; you should take me back, he'd have been going there to get the medication. We have a man who, under the law, is insane. And we're arguing over whether or not he can accept responsibility for what he did. If he can accept responsibility, I'd get him out of St. E's tomorrow. If he can accept responsibility for showing remorse. But for purposes of these guidelines, which I think are unduly harsh and a disgrace to begin with, Mr. Braxton can be seen, and should be seen, as having ac-

cepted responsibility for having the gun. You'll notice there's been no argument over that. No one said he hasn't accepted the responsibility for having the handgun. He's had that. We just don't like the fact that maybe he assaulted marshals, and maybe it didn't amount to Attempted Murder, even though he pulled the trigger on the gun, and therefore he didn't accept responsibility for that. That's sophistic, and I reject that. The man has accepted responsibility.

Now, whether Your Honor should depart below level 16, even without opening my mouth, I'm [18] confident Your Honor knows my position about that. Mr.—Mr. Braxton will get five years, at least, from this Court. He will not get out of St. Elizabeth's within that five years. What will happen is what we have told the Court previously in chambers, but since it's some time previously, I'll put it on the record. He will go back to St. Elizabeth's, and they will then try to give him some kind of grounds privileges or something to adjust where he's kept in the John Howard Pavilion. At that time, the fact that this Court has a detainer on him for service of sentence will register, St. Elizabeth's will then contact this Court, through whatever channel they use, and say, what is there about Mr. Braxton that means we have to treat him differently than we treat everybody else here? And the Court will say, he's got a detainer for jail time. And that St. Elizabeth's, at that point, will institute proceedings to put him in federal custody, because they don't want people they can't treat like every other inmate. They can't do it. He will go to, hopefully, Rochester, Minnesota, or one of the medical centers, where, by the way, he may go anyway, because St. Elizabeth's is trying to affect a transfer of many of its—of its inmates to that facility. He will serve his time there without parole, minus—except for the 54 days a year good time that he can get, and you know as well as I do, that one day he's [19] going to miss medication out at wherever federal institution he's in, and he's going to go off, and

there goes the good time for that year. So he will stay in that place, and then he'll be released back to St. Elizabeth's. So we're looking at at least five years of federal time to begin at some point in the indefinite future, after which he goes back to St. Elizabeth's. The guidelines say you can't—you can only look at Mr. Braxton's diminished capacity if he committed a non-violent offense. If he committed a non-violent offense, no one would care, probably, depending on what it was. We certainly wouldn't be here. The problem is, people in Mr. Braxton's position, who have the diminished capacity, commit violent offenses. That's why they're in the diminished capacity. But you're not allowed to consider that, because the Commission has said, we don't want those people to get a break.

Your Honor can deal with that as you see fit. I know that in—in a case that Mr. Feldman had in front of Judge Smolkin the other day, that involved a diminished capacity history, or a mental—mental capacity issue, Judge Smolkin departed nine levels to give the Defendant a bit of a break. That is not—the facts of that case are not parallel to the facts of this case, but the point is that just because someone can be said to superficially or technically meet the guidelines, doesn't [20] mean we can't manipulate the guidelines in an honorable way to give people a sentence they ought to be getting. I know Your Honor's concerned about that, because it was your due process opinion that the Fourth Circuit has sent back. I have—I'll tell this Court boldly that I have no hesitancy about manipulating the guidelines because the guidelines manipulate my ability to speak for my clients. They tell me that the purpose—the reason you're a defense lawyer to stand with people like Mr. Braxton and speak to the Court that are incapable of speaking, we don't want to hear it, because we don't care. I'll—if the Commission and the Congress and eight members of the Supreme Court are going to say that to me, I'm going to have enough arrogance to say back, well I don't care

either. And if I can manipulate these guidelines to do what I think is right, I'm going to do it. I think what's right in this case is to give Mr. Braxton a five-year sentence, and give him a—an Assault Sentence on the second count. I won't be so—I won't be so arrogant to say probation or two months or something nominal on the Assault Count, because there was an assault, and the marshals were put in jeopardy.

And from Ms. Ringler's position, if I stood on this side of the Courtroom, I would say this man tried to murder marshals, but standing on this side of the [21] Courtroom, I can say, he didn't try to murder anybody. He tried not to go back to St. Elizabeth's. Now, people may have gotten killed, but they didn't. And his use of that gun is what aggravates the assault guideline. I would ask Your Honor to give the five years, followed by nothing worse than a level sixteen. That would be the fifteen plus the three points because there's a Federal Official involved, minus two for acceptance of responsibility, which is sixteen. My preference is the level fifteen as the base offense level, no extra three points, because I think that one can make an ambiguity between the statute and the guideline. The statute is concerned only with an assault on a Federal Official, and it refers you to a guideline and says, that's the guideline for assault on Federal Official. And the way I read that, to enhance by three levels is to say, this is the guideline for an assault on a Federal Official, which we're going to aggravate by three levels because he assaulted a Federal Official. That's ridiculous. I can read it that way. I can read it that way honorably, and I'm going to, in my position, give Mr. Braxton the benefit of that confusion. And I'm going to give him the two points for acceptance of responsibility, and I'm going to come up with a level thirteen, which is what I think I indicated in my response to Mr. Feldman, which in Mr. Braxton's criminal history, is a sentence of [22] fifteen to twenty-one months. I'll ask Your Honor to give Mr. Braxton five

years, followed by fifteen months, and I think Mr. Braxton wants to address the Court after Ms. Ringler responds, if she chooses to do so, and of course, Doctor Blumberg would address the acceptance of responsibility, if you have questions.

THE COURT: I want to hear from Doctor Blumberg, basically on—very briefly on this acceptance of responsibility. You don't have to take the stand, unless Mrs. Ringo—Ringler wants you to.

MS. RINGLER: That's not necessary, Your Honor.

THE COURT: If you want to just tell me what your view is on this?

DOCTOR BLUMBERG: Well, Mr. Braxton acknowledged his involvement in the offense, that yes, he was in fact responsible, or he did fire the gun, giving a fairly detailed rendition of what was going on at that time. From his perspective, he felt justified in using a level of force that he did. Based upon my examination, the primary thought in his mind was that he was not going back to the hospital. But underlying that was the belief, first of all, that he's not mentally ill, and that there is no reason for him to be in the hospital in the first place, which is part of why he was in the hospital. That is the denial of the illness is part of, and typically seen in [23] individuals who are schizophrenic. Here also, at least was in part, delusional thinking about the hospital, which fueled his desire not to return to the outpatient clinic, and not to go back in the hospital. I felt that this played a part in why he was so resistent, although it didn't rise to the level of the other understandable and say rational aspect of he didn't want to go back to the hospital, and he was going to do whatever he could not to. That is, he believed that people in the outpatient department were talking about him, accusing him of having aids, that they might have felt that he was a homosexual. There are a lot of things that are very much wrapped up into his—his illness. I think that to the extent that he's capable, he's acknowledged doing the act that—that was done. But his

illness really prevents him from experiencing remorse because of the distortion of his perception both at that time and—and at the present time. The other thing that might not have as clearly come across in my report as—as I had wanted, is that despite the finding that he does not meet the insanity statute, this is a borderline case and comes close to the—the statutory—statutory limit, but I couldn't go beyond that. There's a delusional component, but that was not the overriding issue, although a significant one. So again, it's not that he is a—clearly a well man who understood [24] all of the implications and was acting out of kind of a basic anti-social attitude, but I see him as a very disturbed man, and that his actions were, at least in a great part, related to his illness, although not to the extent that the statutory guidelines for insanity offenses would—would require.

THE COURT: Thank you very much, doctor.

Ms. Ringler, is there anything you want to say, briefly? I know that Mr. Cribari said he wasn't going to talk about the three points, and he did a little bit anyway. But I understand your argument.

MS. RINGLER: If he—I'm sure the Court understands my argument, and that is basically just that the—the guidelines apply to also all attempted murders. They don't take into consideration the status of the individual who has been victimized. And while the statute does, the guidelines do not, and that is why the three points apply. With respect to whether or not the Court can apply 1B1.2, Mr. Cribari highlighted the statement whether or not there is a guilty plea in there containing a stipulation. I would submit that that section does not purport to state that it only must be a written guilty plea, or that that stipulation must specifically be agreed to in writing by the Defendant. I—if my recollection serves me, I think at the conclusion of the Statement of [25] Fact that was read by me at the time of this guilty plea, the Court asked Mr. Braxton if he agreed with that Statement of Fact, and he said he did, all except for one fact,

that being the order in which the shots were fired at the U.S. Marshals. The word stipulation merely means agreement, and I would submit that if the Court deems that the Defendant has agreed to a greater offense than the Aggravated Assault, that it is within the Court's power to sentence the Defendant under the Attempted Murder guideline.

MR. CRIBARI: Your Honor, may I respond to that?

THE COURT: Yes, you can.

MR. CRIBARI: Thank you. Your Honor, if Mr. Braxton was really stipulating to the fact that he attempted to murder marshals, he would have pled guilty to attempting to murder marshals. He did not. There's a not guilty plea to that count, number one. Number two, the guidelines, not the policy statements, the guidelines are construed as law. And it says, Stipulation. Would you admit a stipulation at a trial not signed by the Defendant? If you would not, then there's no stipulation here. And I—I think it's an extraordinarily dangerous position to take to say that we will imaginatively construe stipulation, because every time anybody pleads guilty, we're going to have a 1B1.2 case, as they acknowledge that [26] what the government says they did, they did. If they're not going to acknowledge that, it's not going to be a guilty plea.

The last thing I would like to read two sentences from Judge Bazalong's (ph) book, "Questioning Authority." Quote. "By declaring a small number not responsible, we emphasize the responsibility of all others who commit crimes." This is in the prologue to the morality and criminal law insanity discussion. Quote. "By cultivating our understanding of these limits, we illuminate and strengthen the moral authority of the criminal law." Closed quote. It is my position that Mr. Braxton is one of those people on the un—the non-responsible side of those limits. Now, the law, as it exists today, the insanity rules, the guidelines, prevent Mr. Braxton from arguing

that, but it does not prevent Your Honor, especially under 1B1.4, if you want the due process guideline, from considering whatever you want in giving a sentence, and you have to consider the fact that Mr. Braxton has been in and out of St. Elizabeth's since 1961, permanently since 1974. Thank you, Your Honor.

THE COURT: All right.

Mr. Braxton, before I impose sentence upon you, I'd be glad to hear anything that you would like to say. You certainly don't have to say anything. I [27] wouldn't hold that against you in any respect. If you want to say anything, I'd be glad to consider that as well.

MR. BRAXTON: Yes, sir, Your Honor. Do you want me to stand? Do you want me to stand?

THE COURT: I think that would probably be best.

MR. BRAXTON: Fine. I'd like to plead, and put my plea in that I pled guilty to the charges, and that I did shoot at the marshals when my door was kicked in, but I was not trying to kill the marshals, harm the marshals. I was—it was all happening in such a fast instant that the only thing I could think of doing was defending my home and trying to keep them from taking me back to St. Elizabeth's. I'm asking the Court for leniency on my behalf, and I'm asking that I be given a suspended sentence with the time served, the fourteen—almost fourteen months served on consideration.

THE COURT: Thank you. Let me state what my sentence is, and state briefly the reasons for it. You don't have to stand up while I do this.

I—on Count 2, I am going to sentence you to the custody of the Attorney General for a period of sixty-three months. And on Count 2,—excuse me, Count 3, add the five years required by law, impose a special assessment of $50 each count, a period of supervised release of three years, no fine. Let me state [28] the reasons for this. I am fully satisfied that under the circumstances of this case, and I won't get into the technicalities whether it's under 1B1.2 or 1B1.3, that I can consider all the conduct

—relevant conduct in setting the offense level and making adjustments. And I realize, and there certainly is no indication, Mr. Cribari's made it absolutely clear throughout that, Mr. Braxton, on your behalf, there's been no stipulation to Attempted Murder, and the record's clear on that. But the facts, as I understand them to be, as set forth and acknowledged at the guilty plea proceeding, and even if it's not acknowledged, as they are, I can consider them under 1B1.3. One cannot, from a legal perspective, and not as a moralist, not as a theologian, not as anything else, from a legal perspective, those facts added up, in my judgment, to the—to a higher offense, and so therefore, I'm compelled to find an offense level twenty. I may say, and I won't allude to this again because it will just make the proceedings more complex, that if for some reason I was incorrect legally in making and considering those facts and setting the offense level, I would use them to depart under 1B1.4 up to the level where I am—within which I am sentencing. So whether it's deemed, whether I'm technically wrong in considering the facts in setting an offense level, I would say that I would use those same facts to depart to the extent that—[29] that what I'm saying is a departure.

The—legally, I have no doubt that the three points should be added. The specific offense characteristics are not mentioned in the guidelines. I—here the fact that the statute is in this guideline seems to me that it's perfectly clear that the guidelines contemplate that where there is an assault on a Federal Officer, these three points be added, and I think legally, that's just as clear as it could be. So I am then at the level 23. The most difficult question is the question of acceptance and responsibility. And Mr. Cribari has been eloquent in that regard, as he has been in all respects. And he's given Mr. Braxton excellent representation. I approach the acceptance of responsibility question really not in a broad perspective, but in a narrow perspective of what does it mean in the context of the guidelines. And I think that the purpose

of giving the reduction is has the Defendant taken the steps toward rehabilitation, which acceptance of responsibility is the first step toward that? In some cases, that may require no more than a plead of guilty, and in other cases, it may require a show of remorse. And I think that varies from case to case. It is an unfortunate fact in this case, and I understand Mr. Braxton's and Mr. Cribari's—the problem as he poses it, but I think he—he mis-states the [30] problem. The—in Mr. Braxton's case, unfortunately, because of the condition in which Mr. Braxton is, he is unable to take that step, perhaps, towards rehabilitation at that time because he cannot accept responsibility. And I under—I can fully understand the conversation Mr. Cribari had with—with his client back in, you know, why am I in St. E's., and why can't I —why am I insane, and if not, why don't I have an insanity defense here? I understand that from an academic, theoretical perspective, it all seems illogical. But I think if you focus upon the acceptance of responsibility in terms of what the purpose of that—of that reduction is given, unfortunately, Mr. Braxton here cannot appreciate and cannot take that step which acceptance of the responsibility entails and entitles him to the—to the two point reduction. So I, from a—this is not a—not making any moral judgments in the fact that Mr. Braxton hasn't accepted responsibility to the extent that he can. I—I appreciate that, and I think Doctor Blumberg is right, that he has to the extent that he can. Unfortunately, from a legal perspective, the extent that he can is not sufficient to entitle him to—to the two-level reduction, in light of the purpose of that reduction. So that's my sentence and—and the reasons for it.

Let's see, did I forget something?

[31] MS. RINGLER: Is that concurrent?

THE COURT: No, it's consecutive. As a matter of law, the five years on Count Three, has to be consecutive to the sixty-three months on Count 2. Ms. Ringler?

MS. RINGLER: Your Honor, the government would move to dismiss Count One of the Indictment which is pending against Mr. Braxton in this case.

THE COURT: I assume there's no objection to that.

MR. CRIBARI: No objection at all, Your Honor.

THE COURT: And I'll grant that Motion. Anything further?

MS. RINGLER: No, Your Honor.

THE COURT: Thank you.

(End of Sentencing)

FILED ENTERED
LODGED RECEIVED
JUL 26 1989
AT BALTIMORE
CLERK U.S. DISTRICT COURT
DISTRICT OF MARYLAND
BY CRIMINAL DEPUTY

United States District Court

FOR THE _____ District of MARYLAND

UNITED STATES OF AMERICA

V.

THOMAS BRAXTON
DEFENDANT NO. 01

(Name of Defendant)

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number JFM-88-0252

Susan Ringler, AUSA
ATTORNEY FOR UNITED STATES
Stephen Cribari, AFPD
Defendant's Attorney

THE DEFENDANT:

XX pleaded guilty to count(s) 2 and 3 .
☐ was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
18:111 & 2	Assault on a Federal Officer; Aiding and Abetting (Ct. 2)	1
18:924(c) & 2	Use of a Firearm During a Crime of Violence; Aiding and Abetting (Ct. 3)	1

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).
XX Count(s) one (1) (is)~~(are)~~ dismissed on the motion of the United States.
☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
XX It is ordered that the defendant shall pay to the United States a special assessment of $ 50.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:

JULY 21, 1989
Date of Imposition of Sentence

Defendant's mailing address:

Signature of Judicial Officer
J. FREDERICK MOTZ, U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

Defendant's residence address:

7/24/89
Date

Defendant: THOMAS BRAXTON
Case Number: JFM-88-(2

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of sixty-three (63) months as to Count 2, and five (5) years as to Count 3, to run consecutively to sentence imposed on Count 2.

☐ The Court makes the following recommendations to the Bureau of Prisons:

XX The defendant is remanded to the custody of the United States Marshal.
☐ The defendant shall surrender to the United States Marshal for this district,
☐ at _____ a.m. p.m. on _____.
☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons
☐ before 2 p.m. on _____.
☐ as notified by the United States Marshal.
☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: THOMAS BRAXTON
Case Number: JFM-88-0252

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

Defendant: JFM-88-0252
Case Number: THOMAS BRAXTON

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;
2) the defendant shall not leave the judicial district without the permission of the court or probation officer;
3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
5) the defendant shall support his or her dependents and meet other family responsibilities;
6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;
8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

I hereby attest and certify on 7/26/89
that the foregoing document is a full, true and correct copy of the original on file in my office and in my legal custody

JOSEPH A. HAAS
CLERK, U. S. DISTRICT COURT
DISTRICT OF MARYLAND
By Julie M. Stinnett Deputy

84

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

(Title Omitted in Printing)

ORDER

Defendant presently being confined at the John Howard Pavillion for the Criminally Insane at St. Elizabeths Hospital in Washington. D.C., and it being this Court's intention that the sentence imposed upon defendant on July 21, 1989 is to run from the date of imposition, it is this 24th day of October 1989

ORDERED that as long as defendant remains confined at the John Howard Pavillion for the Criminally Insane at St. Elizabeths Hospital, that institution is designated as the place of defendant's confinement under this Court's sentence imposed on July 21, 1989.

/s/ J. Frederick Motz
J. FREDERICK MOTZ
United States District Court

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 89-5651

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

THOMAS BRAXTON,
Defendant-Appellant.

Argued Feb. 8, 1990

Decided May 8, 1990

CHAPMAN, Circuit Judge:

At sentencing Thomas Braxton was denied a two-level reduction for acceptance of responsibility, because the sentencing judge found that the purpose of acceptance of responsibility was to lead toward rehabilitation, and that because of his mental and emotional condition Braxton could not accept responsibility to the extent necessary to entitle him to the reduction. Appellant claims error because the court found rehabilitation to be a necessary element in its consideration of the request for the reduction. We agree.

Appellant also challenges the district court's use of a base offense level greater than the level applicable to the crimes to which he pled guilty. He claims that it was error to enhance the base offense level in the absence of a stipulation, as provided in § 1B1.2(a), to the more

serious crime of attempted murder. We find that the word "stipulation" as used in this section includes a defendant's oral agreement or acceptance on the record of the government's presentation to the court of facts establishing an offense more serious than his offense of conviction.

Therefore, we affirm the district court's use of the enhanced base offense level, but we reverse and remand for resentencing because of the district court's misinterpretation of the law relating to acceptance of responsibility.

I

In September 1974, Thomas Braxton was confined to St. Elizabeth's Hospital in Washington, D.C., pursuant to a United States District Court order, after he had been found not guilty by reason of insanity on a charge of bank robbery. On May 12, 1988, the United States Marshal for the District of Columbia received an arrest warrant charging Braxton with unauthorized leave from the hospital, and on June 9, 1988, the Marshal's Service found that Braxton was living in Mt. Rainier, Maryland. Early on the morning of June 10, 1988, four deputy marshals went to the Maryland address and determined that Braxton was in Apartment 3. They knocked on the door and advised appellant that they had an arrest warrant for him. There was no response although the deputies could hear movement within the apartment. After the deputies knocked again, identified themselves and unlocked the door, appellant fired a .38 caliber revolver through the door opening. None of the deputies was hit and shortly thereafter appellant fired another round through the doorway. Braxton advised the deputies that he was not coming out and was not going back to the hospital. He threatened to kill them if they came into the apartment. Reinforcements were called and tear gas was used to subdue the appellant and arrest him. Braxton stated after arrest that he knew the United

States Marshals were knocking on his door, and he fired at them because he did not wish to return to the hospital.

At arraignment, defense counsel requested a continuance for approximately eight months to have the appellant evaluated by a psychiatrist to determine his competency and to evaluate whether an insanity defense could be used. In March 1989, defense counsel advised the court that Braxton was competent to stand trial and that he would not be presenting an insanity defense. In May 1989, without the benefit of a plea agreement, appellant pled guilty to Counts 2 and 3 of the indictment, which charged (2) assault on a federal officer in violation of 18 U.S.C. § 111, and (3) use of a firearm during a crime of violence in violation of 18 U.S.C. § 924(c). The court conducted the proceeding required by Federal Rule of Criminal Procedure 11 and advised appellant that Count 1, which charged attempt to murder, was still outstanding against him, and as to Counts 2 and 3 he would be sentenced under the sentencing guidelines. After finding that appellant was mentally competent, that he entered the plea voluntarily and without a plea agreement, and that there was a factual basis for the plea, the court accepted the pleas of guilty. The court solicited memoranda from defense counsel and the United States Attorney on the issue of an appropriate sentence. Prior to sentencing, defense counsel filed written objections to the presentence investigation report as it dealt with acceptance of responsibility, victim related adjustments, and the suggested base offense level using the more serious offense of attempted murder.

On July 21, 1989, Braxton was sentenced. Prior to sentencing, all of the pertinent medical records and reports were reviewed by the court. Dr. Neil Blumberg, a psychiatrist who had evaluated appellant at his attorney's request, testified that Braxton was schizophrenic but not insane, and that he should remain in the maximum security inpatient facility at St. Elizabeth's Hospital while serving any sentence. Pursuant to the 1984 Guidelines, Braxton was sentenced to 63 months imprisonment for assaulting a federal officer, to be followed by 60 months incarceration for use of a handgun,[1] and a three-year term of supervised release to commence on release from imprisonment. The government's motion to dismiss Count 1 of the indictment was then granted. During the sentencing, the court denied appellant's request for a two-level reduction for acceptance of responsibility. This denial was based upon the court's finding that due to Braxton's mental illness he could not show remorse for what he had done, and without remorse he could not take the necessary step toward rehabilitation and accept responsibility.

II

Rehabilitation is no longer a purpose for incarcerating a defendant under the federal law. This was made clear when Congress created the United States Sentencing Commission for the purpose of establishing sentencing policies and practices for the Federal Criminal Justice System. At 28 U.S.C. § 994(k), it is stated: "The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of *rehabilitating* the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." (Emphasis added.) In *Mistretta v. United States*, 488 U.S. 361, 109 S.Ct. 647, 652, 102 L.Ed.2d 714 (1989), the Court found:

> The Act, as adopted, revises the old sentencing process in several ways:
>
> 1. It rejects imprisonment as a means of promoting *rehabilitation*, 28 U.S.C. § 994(k), and

[1] This is a mandatory five-year consecutive sentence. 18 U.S.C. § 924(c).

it states that punishment should serve retributive, educational, deterrent, and incapacitative goals, 18 U.S.C. § 3553(a)(2).

(Emphasis added.)

Acceptance of responsibility is covered in part E of the guidelines and provides:

§ 3E1.1. *Acceptance of Responsibility.*

(a) If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by 2 levels.

(b) A defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea or a finding of guilty by the court or jury or the practical certainty of conviction at trial.

(c) A defendant who enters a guilty plea is not entitled to a sentencing reduction under his section as a matter of right.

Commentary

Application Notes:

1. In determining whether a defendant qualifies for this provision, appropriate considerations include, but are not limited to, the following:

(a) voluntary termination or withdrawal from criminal conduct or associations;

(b) voluntary payment of restitution prior to adjudication of guilt;

(c) voluntary and truthful admission to authorities of involvement in the offense and related conduct;

(d) voluntary surrender to authorities promptly after commission of the offense;

(e) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;

(f) voluntary resignation from the office or position held during the commission of the offense; and

(g) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

2. Conviction by trial does not preclude a defendant from consideration under this section. A defendant may manifest sincere contrition even if he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (*e.g.*, to make a constitutioal challenge to a statute or a challenge to the applicability of a statute to his conduct).

3. A guilty plea may provide some evidence of the defendant's acceptance of responsibility. However, it does not, by itself, entitle a defendant to a reduced sentence under this section.

4. Conduct resulting in an enhancement under § 3C1.1 (Willfully Obstructing or Impeding Proceedings) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§ 3C1.1 and 3E1.1 may apply.

5. The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review and

should not be disturbed unless it is without foundation.

Background: The reduction of offense level provided by this section recognizes legitimate societal interests. For several reasons, a defendant who clearly demonstrates a recognition and affirmative acceptance of personal responsibility for the offense by taking, in a timely fashion, one or more of the actions listed above (or some equivalent action) is appropriately given a lesser sentence than a defendant who has not demonstrated sincere remorse.

The availability of a reduction under § 3E1.1 is not controlled by whether the conviction was by trial or plea of guilty. Although a guilty plea may show some evidence of acceptance of responsibility, it does not automatically entitle the defendant to a sentencing adjustment.

In denying the appellant a reduction of acceptance of responsibility, the sentencing court stated:

I approach the acceptance of responsibility question really not in a broad perspective, but in a narrow perspective of what does it mean in the context of the guidelines. And I think that the purpose of giving the reduction is has the defendant taken the steps towards rehabilitation, which acceptance of responsibility is the first step toward that? In some cases, that may require no more than a plead (sic) of guilty, and in other cases, it may require a show of remorse. And I think that varies from case to case. It is an unfortunate fact in this case, and I understand Mr. Braxton's and Mr. Cribari's—the problem as he poses it, but I think he—he mis-states the problem. The—in Mr. Braxton's case, unfortunately, because of the condition in which Mr. Braxton is, he is unable to take that step, perhaps, towards rehabilitation at that time because he cannot accept responsi-

bility. And I under—I can fully understand the conversation Mr. Cribari had with—with his client back in, you know, why am I at St. E's., and why can't I—why am I insane, and if not, why don't I have a insanity defense here? I understand that from an academic, theoretical perspective, it all seems illogical. But I think if you focus upon the acceptance of responsibility in terms of what the purpose of that—of that reduction is given, unfortunately, Mr. Braxton here cannot appreciate and cannot take that step which acceptance of the responsibility entails and entitles him to the—to the two point reduction. So I, from a—this is not a—not making any moral judgments in the fact that Mr. Braxton hasn't accepted responsibility to the extent that he can. I—I appreciate that, and I think Doctor Blumberg is right, that he has to the extent that he can. Unfortunately, *from a legal perspective*, the extent that he can is not sufficient to entitle him to—to the two-level reduction, in light of the purpose of that reduction. So that's my sentence and—and the reasons for it.

(Emphasis added.) The judge's stated reason for refusing the two-level reduction for acceptance of responsibility demonstrates that he understood the law to require that acceptance of responsibility be a step toward rehabilitation and that the purpose of the reduction had rehabilitation as a goal. Nowhere in § 3E1.1, or in the application notes or background commentary, is the word "rehabilitation" mentioned. We have not considered rehabilitation in any of our decisions construing the meaning or application of § 3E1.1. *See United States v. White*, 875 F.2d 427 (4th Cir.1989); *United States v. Urrego-Linares*, 879 F.2d 1234 (4th Cir.), *cert. denied*, —— U.S. ——, 110 S.Ct. 346, 107 L.Ed.2d 334 (1989); *United States v. Harris*, 882 F.2d 902 (4th Cir. 1989).

The guideline for a reduction of sentence is addressed to whether a "defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility

for his criminal conduct." § 3E1.1(a). The district judge has found that Braxton accepted responsibility to the extent that he could. The problem may have been occasioned by the testimony of Dr. Neil Blumberg, a psychiatrist who had examined and evaluated the appellant. According to Dr. Blumberg, appellant acknowledged his involvement in the offense and his responsibility, but felt justified in using force because he did not wish to return to the hospital because he did not feel that he was mentally ill. The doctor found that Braxton was schizophrenic and that Braxton thought people in the hospital were talking about him and accusing him of having AIDS. The psychiatrist stated that Braxton was a borderline case of insanity: "But his illness really prevents him from experiencing remorse because of the distortion of his perception both at that time and—at the present time." Although the trial court accepted this evidence and found that Braxton was sane and had accepted responsibility to the extent that he could, the court misperceived the purpose of the guideline by interjecting into the calculus a need for rehabilitation. This was error, because rehabilitation is not a factor in the consideration of acceptance of responsibility.

We do not hold that Braxton is entitled to a two-level reduction as a matter of law, but we do hold that the sentencing judge erred when he denied the reduction as a matter of law because Braxton could not prove that he was taking steps toward rehabilitation. The sentence as to Count 2 must be set aside and Braxton resentenced. The sentence as to Count 3 is a mandatory five-year minimum consecutive sentence and it is not affected by the district court's error in sentencing on Count 2.

III

Appellant claims additional error by the district judge in applying the base offense level for attempted murder,[2]

[2] The base offense level for attempted murder is 20. § 2A2.1. The base offense level for aggravated assault is 15. § 2A2.2.

because he pled guilty only to aggravated assault of federal officers and to the use of a handgun during a crime of violence, and there was no stipulation to the more serious offense of attempted murder.

In establishing the applicable guidelines, § 1B.12(a) provides:

> Determine the offense guideline section in Chapter Two (Offense Conduct) most applicable to the offense of conviction (*i.e.*, the offense conduct charged in the count of the indictment or information of which the defendant was convicted). *Provided*, however, in the case of conviction by a plea of guilty or *nolo contendere* containing a stipulation that specifically establishes a more serious offense than the offense of conviction, determine the offense guideline section in Chapter Two most applicable to the stipulated offense.

The present case is complicated because a plea agreement is not involved. Defendant pled guilty to Counts 2 and 3 of the indictment without any understanding as to what would happen to Count 1. Although this count was dismissed by the government after appellant was sentenced on Counts 2 and 3, there was no agreement that this would be done.

Since there was no plea agreement, written or oral, and there was no agreement of the facts designated to be a stipulation, we are presented with the question of whether § 1B1.2 requires that the stipulation mentioned therein be called "stipulation," or whether a defendant's agreement to the statement of facts by the government can be interpreted as a stipulation for the purposes of establishing a more serious offense than the offense of conviction under § 1B1.2(a).

At various hearings in this matter—arraignment, change of plea, and sentencing—appellant was carefully and clearly instructed that he was subject to the Sen-

tencing Guidelines, and the court would be required to set a sentence pursuant to such guidelines, and that the court would make findings as to the proper base offense level from the evidence presented. It was never a secret that the United States Attorney was treating the offense as attempted murder, and defendant's attorney stated to the district court at sentencing: "There is lurking in the background the allegation of an attempted murder."

Braxton admitted to the court:

> I did shoot at the Marshals when my door was kicked in, but I was not trying to kill the Marshals, harm the Marshals. I was—it was all happening in such a fast instant that the only thing I could think of doing was defending my home and trying to keep them from taking me back to St. Elizabeth's.

At the change of plea hearing, appellant's attorney advised the court that he had explained the guidelines to Braxton and had explained that the court "could depart upward if you think he tried to murder the Marshals." At this same hearing the government made an oral factual presentation to the court in support of the charges against Braxton. This presentation included the firing of the two shots through the doorway while the Marshals were attempting to gain entrance, and it also included the statements of the defendant that he would kill the Marshals if they came inside and that he knew that they were Deputy United States Marshals.

Following this presentation of the facts, Braxton's attorney stated that the facts were accurate, but Braxton thought the two shots were fired almost simultaneously and not at different times. The court then addressed Braxton personally and asked him if the government could prove what it said had actually happened. Braxton answered in the affirmative.

At sentencing the district court found that these facts, which were not in dispute, supported a finding of attempted murder. This finding is subject to a clearly erroneous standard of review, *United States v. Daughtrey*, 874 F.2d 213 (4th Cir.1989), and we conclude that this finding is not clearly erroneous. However, appellant contends that under § 1B1.2(a) the district court cannot use this finding to determine the base offense level because there has not been "a stipulation specifically establishing a more serious offense than the offense of conviction." This issue is complicated by the statement made by the district judge at sentencing that the defendant had not "stipulated" to attempted murder; however, the court went on to find that the facts as acknowledged by Braxton added up to the higher offense of attempted murder.

On the issue of base offense level, the court made the finding:

> I am fully satisfied that under the circumstances of this case, and I won't get into the technicalities whether it's under 1B1.2 or 1B1.3, that I can consider all the conduct—relevant conduct in setting the offense level and making adjustments. And I realize, and there certainly is no indication, Mr. Cribari's made it absolutely clear throughout that, Mr. Braxton, on your behalf, there has been no stipulation to Attempted Murder and the record's clear on that. But the facts, as I understand them to be, as set forth and acknowledged at the guilty plea proceeding, and even if it's not acknowledged, as they are, I can consider them under 1B1.3. One cannot, from a legal perspective, and not as a moralist, not as a theologian, not as anything else, from a legal perspective, those facts added up, in my judgment, to the—to a higher offense, and so therefore, I'm compelled to find an offense level twenty. I may say, and I won't allude to this again because it will just make the proceedings more complex, that if for some reason I was incorrect legally in making and considering those facts and setting the offense level, I

would use them to depart under 1B1.4 up to the level where I am—within which I am sentencing. So whether it's deemed, whether I'm technically wrong in considering the facts in setting an offense level, I would say that I would use those same facts to depart to the extent that—that what I'm saying is a departure.

The—legally, I have no doubt that the three points should be added. The specific offense characteristics are not mentioned in the guidelines. I—here the fact that the statute is in this guideline seems to me that it's perfectly clear that the guidelines contemplate that where there is an assault on a Federal Officer, these three points be added, and I think legally, that's just as clear as it could be. So I am then at the level 23.

Although § 1B1.2 uses the word "stipulation" and the district judge stated that there was "no stipulation to attempted murder," we are persuaded that "stipulation" in § 1B1.2 is not used in a restrictive way so that only an agreement designated as a "stipulation" would comply with the guideline. As used in this section "stipulation" means an agreement as to the facts that specifically establishes a more serious offense than the offense of conviction. There is no requirement in the guidelines or in the commentary or application notes that this stipulation must be in writing. It is only necessary that the facts presented to the court establish a more serious crime and that the defendant agree to the statement of facts.

In the present case, Braxton agreed to the proffer of facts by the government in which he admitted that he fired two shots through the doorway at the marshals, that he said he would kill them if they came in, and that he threatened to kill any additional support personnel called to the scene, if they attempted to come into his apartment. It is the agreement to these facts that qualifies as a stipulation under § 1B1.2, and these facts clearly support the district court's finding of attempted murder. In *United States v. Correa-Vargas*, 860 F.2d 35, 39 (2d Cir.1988), there was no plea agreement with stipulated facts. The defendant entered a plea to use of a communication facility in commission of a drug offense but he did not contest the presentation of facts that showed that 20 kilos of cocaine were involved. The Second Circuit concluded that the sentencing court could consider this information under § 1B1.4 which allows the court to consider any information concerning the background, character and conduct of the defendant in departing from the guidelines, or under § 5K2.0, the policy statement on grounds for departing from the guidelines, or under § 1B1.2 as an offense more serious than the offense of conviction.

In the present case the judge used § 1B1.2, but held that if this was error, he was making the upward adjustment under § 1B1.4.[3]

We find that the district court's use of § 1B1.2 was correct on the present facts.

IV

Appellant objects to the district court's adjustment under § 3A1.2 by a three-point increase in the base offense level because the appellant fired at federal law enforcement officers. This section provides for a three-level increase if: "(a) the victim was a law enforcement or corrections officer . . . and the offense of conviction was

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[3] Section 1B1.4. *Information To Be Used In Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines).*

In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. *See* 18 U.S.C. § 3661.

motivated by such status." Braxton argues that under § 2A2.2, aggravated assault has a base offense level of 15, that he was charged under 18 U.S.C. § 111 of assaulting a federal official, and that to increase his level by three would be double counting. We find no merit to this position. We have concluded that the court was correct in using a base offense level of 20 because the agreed facts support a finding of attempted murder. The calculation of this level did not consider the status of the victim, but § 3A1.2 is applicable because the victims were law enforcement officers. It is not necessary that the law enforcement officer be a casualty to be considered a victim, if the defendant knew that the person was a law enforcement officer and assaulted such officer in a manner creating a substantial risk of serious bodily injury. Section 3A1.2(b). These sections fit the facts of the present case and the district judge did not err in his application of the guidelines and in adding three levels to the base offense.

Therefore, we affirm the district court in its use of a base offense level of 20 for attempted murder pursuant to § 1B1.2 and we approved the three-level increase under § 3A1.2 because the victims were law enforcement officers, but we reverse the denial of a two-level reduction for acceptance of responsibility and remand for resentencing without any reference to or consideration of rehabilitation. We express no opinion as to whether a two-level reduction should be granted when this issue is reconsidered.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR RESENTENCING.

SPROUSE, Circuit Judge, concurring in part and dissenting in part:

I concur in Part II of the opinion holding that rehabilitation is not a factor in the consideration of acceptance of responsibility. I respectfully dissent, however, from Part III of the opinion where my brothers hold that Braxton stipulated under a more serious offense thus permitting an enhancement under guideline section 1B1.2. In my view, "stipulation" as it is used in section 1B1.2(a) at least means an agreement between a defendant and the government.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Cr. No. JFM-88-0252

UNITED STATES OF AMERICA

v.

THOMAS BRAXTON

ORDER

[Filed July 31, 1990]

This matter having come before the Court on the motion of the defendant for grounds privileges, and the Court having conducted a hearing in open court on July 26, 1990, and the Court having considered all matters pertinent thereto including the agreement of the United States, it is this 31st day of July, 1990,

ORDERED, that the defendant's motion be and hereby is granted. It is further

ORDERED, that the defendant be permitted to have grounds privileges at St. Elizabeths Hospital, in the discretion of the Hospital authorities. It is further

ORDERED, that Mr. Braxton is not to be released to community custody. It is further

ORDERED, that all prior conditions of sentencing previously imposed on July 21, 1989, and October 24, 1989, remain in full force and effect.

/s/ J. Frederick Motz
J. FREDERICK MOTZ
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

(Title Omitted in Printing)

GUIDELINE RESENTENCING
JUDGMENT AND COMMITMENT

[Filed Sep. 26, 1990]

On the 21st day of July, 1989, came the attorney for the government and the defendant appeared in person and "by counsel."

IT WAS ADJUDGED that the defendant upon a plea of "GUILTY" as to Count Nos. 2 and 3, had been convicted of the offense of Count 2, U.S.C., Title 18, Section 111 & 2—Assault on a Federal Officer; Aiding and Abetting and Count 3, U.S.C., Title 18, Sections 924(c) & 2—Use of a Firearm During a Crime of Violence; Aiding and Abetting, as charged, and the Court having asked the defendant whether he had anything to say why judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court.

IT WAS ADJUDGED that the defendant was guilty as charged and convicted.

IT WAS ADJUDGED that the defendant be committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of sixty-three (63) months as to Count 2, and five (5) years as to Count 3, to run consecutively to sentence imposed on Count 2. IT WAS FURTHER ORDERED that the defendant be remanded to the custody of the United States Marshal. Upon release from imprisonment, the defendant was placed on supervised release for a term of three (3) years upon terms and conditions.

IT WAS FURTHER ORDERED that Count One was dismissed on the motion of the United States.

IT WAS FURTHER ORDERED that the defendant was to pay a special assessment of $50.00, which was due immediately.

AND WHEREAS on the 5th day of May, 1990, an attested copy of the Order of Judgment of the United States Court of Appeals for the Fourth Circuit was filed in this District Court, it is ordered and adjudged that the judgment of the said District Court appealed from, in this cause, be, and the same hereby, affirmed in part, reversed in part, reversed in part, and the case is remanded to the United States District Court for the District of Maryland, for further proceedings consistent with the opinion.

IT IS ORDERED AND ADJUDGED this 26th day of July, 1990 that the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Fifty-One (51) months as to Count 2, and five (5) years as to Count 3, to run consecutively to sentence imposed on Count 2 for a total term of imprisonment of One Hundred and Eleven (111) months.

IT IS FURTHER ORDERED AND ADJUDGED that the upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years.

IT IS FURTHER ORDERED THAT Count 1 is dismissed on the motion of the United States.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant shall pay a special assessment of One Hundred ($100.00) Dollars for Counts 2 and 3.

IT IS FURTHER ORDERED AND ADJUDGED that the Clerk deliver two (2) certified copies of this Judgment and Commitment to the U.S. Marshal and that a copy shall serve as commitment of the defendant.

/s/ J. Frederick Motz
J. FREDERICK MOTZ
U.S. District Judge

Dated: September 24, 1990

SUPREME COURT OF THE UNITED STATES

No. 90-5358

THOMAS BRAXTON,
Petitioner

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

November 13, 1990

Supreme Court, U.S.
FILED
DEC 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-5358

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THOMAS BRAXTON,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether a defendant has entered a guilty plea "containing a stipulation that specifically establishes a more serious offense than the offense of conviction," according to United States Sentencing Guideline section 1B1.2(a), when he (1) refuses to enter into a plea agreement of any kind, (2) expressly denies committing the more serious offense, and (3) merely agrees with a factual proffer that is not designated as a stipulation but is offered by the government as the factual basis for his guilty pleas to two lesser offenses.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 903 F.2d 292 (4th Cir. 1990). J.A. 86-101. The opinion of the district court is not reported. The district court's oral ruling is set forth in the transcript of sentencing dated July 21, 1989. J.A. 76-78.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1990. J.A. 86. A petition for writ of certiorari was filed on August 3, 1990, and was granted on November 13, 1990. J.A. 105. The jurisdiction of this Court rests on 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The verbatim pertinent text of the following constitutional provision and guidelines is contained in the appendix to the brief:

1. U.S. Const. amend. V.

2. United States Sentencing Commission, *Guidelines Manual*, (June 15, 1988), §§ 1B1.2 and 6B1.4 [hereinafter U.S.S.G.].

STATEMENT OF THE CASE

Thomas Braxton was charged in a three count indictment with (1) an attempt to kill deputy United States marshals in violation of 18 U.S.C. section 1114 (count one); (2) assault on deputy United States marshals in violation of 18 U.S.C. section 111 (count two); and (3) use of a handgun during a crime of violence in violation of 18 U.S.C. section 924(c) (count three). J.A. 2-3. On August 17, 1988, Mr. Braxton pleaded not guilty to all three charges.

On May 23, 1989, during a hearing conducted in accordance with Rule 11 of the Federal Rules of Criminal Procedure, Mr. Braxton pleaded guilty to the assault and handgun charges (counts two and three). J.A. 5. He persisted in his not guilty plea to attempted murder (count one). J.A. 5. Mr. Braxton did not enter into a written or oral plea agreement with the government. J.A. 4. Throughout the Rule 11 hearing, both parties agreed, and the district judge found, that no plea agreement of any kind existed. J.A. 4, 13, 19. During the Rule 11 hearing, the district judge reviewed with Mr. Braxton the elements of counts two and three and the maximum penalties for those offenses. J.A. 7. The district judge inquired into the factual basis for Mr. Braxton's guilty pleas to counts two and three. J.A. 16. The government proffered that it would have been prepared to prove the following facts if the case had proceeded to trial.

In 1974, Mr. Braxton was confined to Saint Elizabeths Hospital in Washington, D.C., pursuant to a United States District Court order finding him not guilty of bank robbery by reason of insanity.[1] In June, 1988, the United States Marshal's Service for the District of Columbia was dispatched to arrest Mr. Braxton on a warrant charging him with unauthorized leave from Saint Elizabeths Hospital. The government also would have proved that:

> [O]n June 10th, 1988, at approximately 7:00 a.m., four Deputy U.S. Marshals named Sherry, Cor-

[1] At the time of these alleged crimes, Mr. Braxton was on unauthorized leave from the care and supervision of Saint Elizabeths Hospital in the District of Columbia. Nevertheless, he was unable to present an insanity defense to the charges because Congress had eliminated the irresistible impulse insanity defense from federal law in the Insanity Defense Reform Act of 1984. P.L. 98-473, 98 Stat. 2057 (1984) (codified as amended at 18 U.S.C. § 20 (1988)).

> ruthers, Kelly and Jenkins went to Mr. Braxton's address at 4301 Eastern Avenue and confirmed that Mr. Braxton resided at Apartment Number 3. At approximately 7:00 a.m., Deputy Jenkins knocked on Apartment 3 and received no response; however, he could hear movement coming from inside the apartment. Deputy Jenkins again knocked, identified himself as a United States Marshal, and advised Mr. Braxton that he had a warrant for his arrest. Again, there was no response from Mr. Braxton. At approximately 7:30 a.m., Deputy Jenkins unlocked the door with keys that had been provided to him by the maintenance staff at the apartment building. Deputy Jenkins again knocked, identified himself as a United States Marshal, and announced his purpose in being there. Deputy Jenkins, who was standing directly in front of the apartment door, opened the door and found that there was a security chain locking it, and so he could only crack it open. At that point, Deputy Jenkins kicked the door open, and contemporaneous with the door opening, a gunshot was fired through the door opening. The gunshot lodged in the front door just above the doorknob. That's the outside of the front door. The four Deputy U.S. Marshals were all located either in front of or next to the front door which had been opened and through which the gunshot had been fired. After several moments, Deputy Jenkins again announced himself, and kicked the door open. The door had snapped shut between the first two attempts to open it. When he kicked it open a second time, a second gunshot was fired again through the door opening. The second bullet lodged approximately five feet high in the door; that's from the floor up to the ceiling. And it was located in the middle of the door about where Deputy Jenkins had been standing.

J.A. 16-18.

The marshals withdrew to a protected position and Mr. Braxton shouted that he was not going to return to Saint

Elizabeths and that he would kill the marshals if they entered the apartment to arrest him. J.A. 18. After a police crisis intervention team arrived on the scene, Mr. Braxton stated that he wanted the team members to come in and get him and that he wanted to kill them. J.A. 18. Although Mr. Braxton fired two additional shots, the government had no evidence that those shots were fired at anyone. J.A. 18. After being advised of his *Miranda* rights, Mr. Braxton stated that he knew United States Marshals were knocking on his door, and that he fired at them because he did not want to return to St. Elizabeths Hospital. J.A. 18.

Following this factual proffer, counsel for Mr. Braxton pointed out that the two shots that hit the door were fired when Deputy Jenkins kicked the door open the first time. J.A. 19. Subject to this correction and another correction regarding recovery of the firearm, counsel for Mr. Braxton acknowledged that the statement of facts was accurate. J.A. 19. Mr. Braxton responded affirmatively when the district judge asked him: "And you admit that you did what the Government says it could prove you could do?" J.A. 19. Counsel for Mr. Braxton explained, however, that "[y]ou can gather from Mr. Braxton's position, and probably from [the government's] statement of facts, that Mr. Braxton admits he assaulted someone and used a handgun, but, obviously, is not admitting he attempted to specifically murder anyone." J.A. 22. The district judge ruled that Mr. Braxton entered the pleas voluntarily "knowing, essentially, that there is no plea agreement." J.A. 19. The district judge accepted the guilty pleas to counts two and three, ordered the preparation of a presentence report, and scheduled a sentencing hearing. J.A. 24-26.

Mr. Braxton appeared before the court for sentencing on July 21, 1989. Because the case arose after November

1, 1987, the Sentencing Reform Act of 1984[2] and the United States Sentencing Guidelines promulgated by the United States Sentencing Commission governed imposition of sentence. Prior to the sentencing hearing, a disagreement arose between the parties over the determination of the offense guideline most applicable to the aggravated assault offense (count two). There was no dispute that (1) aggravated assault carried a base offense level of fifteen, as set forth in Sentencing Guideline section 2A2.2, and (2) attempted murder carried a base offense level of twenty under Sentencing Guideline section 2A2.1. The government, however, argued that pursuant to Sentencing Guideline section 1B1.2 (Applicable Guidelines), the court should disregard the base offense level for aggravated assault and use the higher base offense level of twenty for attempted murder, even though Mr. Braxton had pleaded not guilty to that offense. J.A. 55-59. The presentence report adopted the government's position: "Since there is no plea agreement as to the stipulation in this matter, the Government has indicated that the Court should apply a higher base offense level for the more serious offense of Attempted Murder pursuant to Sentencing Guidelines Section 1B1.2." J.A. 31.

The defendant filed objections to the presentence report, contending that Sentencing Guideline section 1B1.2 did not permit use of the higher base offense level of twenty because Mr. Braxton had not entered into a stipulation to the more serious offense as expressly required by guideline section 1B1.2. J.A. 42-47, 50-52. Counsel for Mr. Braxton urged the court to apply the base offense

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[2] Sentencing Reform Act of 1984, P.L. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586, 3621-3625, 3742 (1988) and 28 U.S.C. §§ 991-998 (1988)).

level of fifteen applicable to aggravated assault as set forth in Sentencing Guideline section 2A2.2. J.A. 63-64.

Mr. Braxton's application of the guidelines, together with certain adjustments and his criminal history category of II, produced an adjusted offense level of thirteen and a guideline imprisonment range of fifteen to twenty-one months for the aggravated assault. Specifically, the defense began the guidelines calculation with a base offense level of fifteen for aggravated assault under Sentencing Guideline section 2A2.2, applied no increase for "official victim" under guidelines section 3A1.2, and subtracted two levels for acceptance of responsibility under guideline section 3E1.1. J.A. 63-65, 72.

The government's application of the guidelines, along with adjustments and the same criminal history category, resulted in a range of imprisonment of fifty-one to sixty-three months for the aggravated assault. The government began with a base offense level of twenty applicable to attempted murder under Sentencing Guideline section 2A2.1, added three offense levels because the marshals were "official victims" under guideline section 3A1.2, and applied no decrease for acceptance of responsibility. J.A. 58.

During the sentencing hearing, the government emphasized that Mr. Braxton does not "think[] what he did was in reckless disregard for the lives of the U.S. Marshals" and "continues to maintain he never intended to * * * kill anyone." J.A. 62. Mr. Braxton admitted that he "did shoot at the marshals when my door was kicked in, but I was not trying to kill the marshals, harm the marshals. I was—it was all happening in such a fast instant that the only thing I could think of doing was defending my home and trying to keep them from taking me back to St. Elizabeth's [sic]." J.A. 76.

The district court, in an oral opinion, expressly ruled that "there's been no stipulation to Attempted Murder, and the record's clear on that." J.A. 77. Nevertheless, the district court decided that the facts "added up" to attempted murder and therefore the court was "compelled to find an offense level twenty."[3] J.A. 77. The court's ruling on the applicable offense level, combined with the district court's other rulings against Mr. Braxton, produced a sentencing range of fifty-one to sixty-three months. The district court imposed a sentence of sixty-three months for assault on federal officers (count two), and a mandatory consecutive sentence of sixty months for the firearm violation (a sentence Mr. Braxton has never challenged). J.A. 76. The sentence for assault on federal officers represented the most severe sentence within the guideline range for attempted murder, the crime to which Mr. Braxton steadfastly had refused to plead guilty. After the district court pronounced sentence, the government moved to dismiss the charge of attempted murder (count one of the indictment). J.A. 79.[4] The district court granted this motion. J.A. 79.

Mr. Braxton appealed his sentence to the United States Court of Appeals for the Fourth Circuit under 18 U.S.C.

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[3] The district judge explained that if he were incorrect with respect to the application of section 1B1.2, then a sentence of sixty-three months for assault on federal officers was justified as an upward departure from the guideline range for aggravated assault under Sentencing Guideline section 1B1.4. J.A. 77. Because the Fourth Circuit affirmed the district court's analysis under guideline section 1B1.2, the court of appeals did not reach the upward departure issue. J.A. 99.

[4] Although the government moved to dismiss count one of the indictment, there was no agreement between the government and Mr. Braxton to this effect. J.A. 13.

section 3742(a). The court of appeals, in a divided opinion, affirmed the sentence with respect to the district court's use of the attempted murder guideline to calculate the base offense level for assault on federal officers. J.A. 86-101. The court of appeals recognized that Mr. Braxton did not enter into a written or oral plea agreement, that there was no agreement of the facts designated to be a stipulation, and that the district judge had ruled that there was no stipulation to attempted murder. J.A. 95, 97. The court of appeals applied a clearly erroneous standard to the district court's ruling that the facts offered as a basis for the guilty plea to assault supported a finding of attempted murder and concluded that this ruling was not clearly erroneous. J.A. 97. The court of appeals adopted a broad interpretation of Sentencing Guideline section 1B1.2, holding that "'stipulation' means an agreement as to the facts that specifically establishes a more serious offense than the offense of conviction." J.A. 98. The court of appeals did not view a stipulation as part of an agreement between the parties, but held instead that a defendant's agreement to the facts "can be interpreted as a stipulation for the purposes of establishing a more serious offense than the offense of conviction under section 1B1.2(a)." J.A. 95.

Because Mr. Braxton had agreed to the government's factual proffer at the Rule 11 hearing, the court found that the district court correctly applied the offense level for attempted murder (count one) under Sentencing Guideline section 1B1.2 rather than the offense level for assault on a federal officer (count two). The dissenting opinion reasoned that an enhanced sentence was improper because a stipulation under Sentencing Guideline section 1B1.2(a) "at least means an agreement between a defendant and the government." J.A. 101.

The court of appeals reversed Mr. Braxton's sentence in part and remanded to the district court because it found that the district court had misunderstood the law relating to acceptance of responsibility under Sentencing Guideline section 3E1.1.[5] J.A. 100. At resentencing, the district court applied a two level reduction for acceptance of responsibility and imposed a sentence of fifty-one months for assault on federal officers (count two). J.A. 103-04. This sentence represents the high end of an offense level twenty-one, criminal history category II. The sentence for the firearm violation (count three) remained unchanged. J.A. 104.

SUMMARY OF ARGUMENT

I. The power to fix the punishment for a federal crime rests with Congress, "and the scope of judicial discretion with respect to a sentence is subject to congressional control." *Mistretta* v. *United States*, 488 U.S. 361, 364 (1989). Congress in the Sentencing Reform Act of 1984 directed the United States Sentencing Commission to promulgate sentencing guidelines. These guidelines are binding on federal courts. *Id.* at 367. Because the guidelines have the force and effect of law, a district court is required to sentence a criminal defendant in accordance with those guidelines.

Section 1B1.2 of the guidelines directs the court to determine the applicable offense guideline section based

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[5] The district court had found that Mr. Braxton could not feel remorse for his actions because of his mental illness. J.A. 77-78. Reasoning that rehabilitation required a demonstration of remorse, and that rehabilitation was a necessary component of the acceptance of responsibility reduction, the district court had denied the two level reduction. J.A. 78. The Fourth Circuit ruled that rehabilitation was an irrelevant consideration for section 3E1.1 purposes. J.A. 94.

upon the offense of conviction. U.S.S.G. § 1B1.2(a). A limited exception to this general rule allows a court to determine the applicable offense guideline section based upon a more serious offense than the offense of conviction "in the case of conviction by plea of guilty * * * containing a stipulation that specifically establishes a more serious offense than the offense of conviction * * *." *Id.* Well-settled principles of statutory construction, the legislative history of guideline section 1B1.2, commentary, and case law compel the conclusion that a defendant's acknowledgment of the statement of facts offered by the government at a hearing conducted pursuant to Rule 11 of the Federal Rules of Criminal Procedure is not a stipulation within the meaning of section 1B1.2. Rather, a section 1B1.2 stipulation must be negotiated between the parties and must be contained within a plea agreement.

A. The plain and commonly accepted meaning of the term "stipulation" is a bargained for agreement between opposing parties that is entered into voluntarily. In criminal cases, bargained for agreements between the government and a defendant regarding disposition of charges generally take the form of a plea agreement. A concession by one party to facts put forth by another party is not sufficient to establish a stipulation.

The guidelines provide that a plea agreement may be accompanied by a stipulation of facts which in most cases must be in writing. U.S.S.G. § 6B1.4, p.s. and comment. Because guideline section 6B1.4 provides for stipulations to be part of a plea agreement, a section 1B1.2 stipulation similarly should be contained within a plea agreement.

B. In this case, Mr. Braxton entered pleas of guilty to assault on federal officers and use of a handgun during a crime of violence. He did not enter into a plea agreement

with the government. Mr. Braxton maintained his not guilty plea to attempted murder and expressly denied committing that offense. Statements made by Mr. Braxton and his lawyer show his unwillingness to enter into a stipulation to the offense of attempted murder. The district court found that Mr. Braxton had not stipulated to the greater offense of attempted murder. In short, Mr. Braxton did not enter a plea containing a stipulation that specifically established the more serious offense of attempted murder.

C. Commentary accompanying section 1B1.2 and the legislative history of the Sentencing Reform Act of 1984 demonstrate that both Congress and the Sentencing Commission intended that a section 1B1.2 stipulation to a more serious offense be contained within a plea agreement. U.S.S.G. § 1B1.2, comment. (n.1); H. Rep. No. 98-1017, 98th Cong., 2d Sess. 99 (1984). The commentary to section 1B1.2 indicates that the Commission adopted the position set forth in the House Report on the 1984 Act. The House Report expressly states that a court may consider facts establishing a more serious offense than the offense of conviction only when "stipulated as part of a plea agreement."

D. Commentary written by the Honorable William Wilkins, Chairman of the United States Sentencing Commission, Wilkins & Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C.L. Rev. 495, 500 (1990), and developing case law throughout the courts of appeals, *e.g.*, *United States* v. *McCall*, 915 F.2d 811 (2d Cir. 1990), support the proposition that the Sentencing Commission intended a section 1B1.2 stipulation to be a negotiated *quid pro quo* in a plea agreement. Essentially, section 1B1.2 establishes a mechanism for the government to extract a stipulation to a more serious

offense than the offense of conviction to secure application of the offense guideline section for the more serious offense. In exchange, the defendant limits his exposure to the maximum term of imprisonment set forth in the statute defining the offense of conviction.

II. A requirement that a section 1B1.2 stipulation be part of a negotiated plea agreement ensures that a defendant enters his plea knowingly and voluntarily with an understanding of the consequences of the stipulation. Rule 11 of the Federal Rules of Criminal Procedure requires a court to inquire into the impact of a plea agreement on the defendant's willingness to enter a plea of guilty. If a section 1B1.2 stipulation is part of a plea agreement, then the court will be able to determine that the defendant understands the consequences of the stipulation. A requirement that a stipulation to a more serious offense be part of a plea agreement also preserves the value of guilty pleas and plea bargaining to the criminal justice system. Allowing a court to find a stipulation from a defendant's mere acknowledgment of the statement of facts proffered by the government at a Rule 11 hearing injects a great deal of uncertainty into the plea process. A defendant's inability to predict whether he will be subject to sentencing for a more serious offense under section 1B1.2 creates a serious disincentive for a defendant to enter a plea of guilty. The end result will be a reduction in the number of guilty pleas and a concomitant increase in criminal trials.

ARGUMENT

I. GUIDELINE SECTION 1B1.2(A) REQUIRES THAT A BASE OFFENSE LEVEL BE CALCULATED ON THE OFFENSE OF CONVICTION UNLESS THE PARTIES SPECIFICALLY STIPULATE TO A GREATER OFFENSE THAN THAT OF CONVICTION.

A criminal defendant is entitled "to have his sentence correctly determined in accordance with the applicable

law." *United States* v. *Khang*, 904 F.2d 1219, 1222 n.5 (8th Cir. 1990) (quoting *United States* v. *Urrego-Linares*, 879 F.2d 1234, 1239 (4th Cir.), *cert. denied*, 110 S. Ct. 346 (1989)). The sentencing process must satisfy the requirements of due process. *Gardner* v. *Florida*, 430 U.S. 349, 358 (1977) (plurality opinion). The Sentencing Reform Act of 1984 and the Sentencing Guidelines promulgated by the United States Sentencing Commission are the law applicable to Mr. Braxton's case. In sentencing Mr. Braxton, however, the lower courts failed to follow the dictates of section 1B1.2 of the Sentencing Guidelines. Thus, Mr. Braxton was deprived of his right to have his sentence determined under the law.

A. Principles of statutory construction provide a particular understanding of the term stipulation.

A majority of this Court, in upholding the constitutionality of the guidelines, has recognized that the Sentencing Reform Act "makes the Sentencing Commission's guidelines binding on the courts." *Mistretta* v. *United States*, 488 U.S. 361, 367 (1989). The binding nature of the guidelines is evident in the Sentencing Reform Act of 1984. Section 3553 of Title 18 of the United States Code generally requires imposition of a sentence within the guideline range promulgated by the United States Sentencing Commission. 18 U.S.C. § 3553 (1988). A sentence that is not in accordance with the guidelines is subject to reversal on appeal. 18 U.S.C. § 3742 (1988). Thus, the guidelines are rules which "have the force and effect of laws, prescribing the sentences criminal defendants are to receive." *Mistretta*, 488 U.S. at 413 (Scalia, J., dissenting). *Cf. Miller* v. *Florida*, 482 U.S. 423, 435 (1987) (Florida sentencing guidelines have the "force and effect of law"). As rules having the force of law, the guidelines should be construed using principles of statutory construction.

Circuit courts across the country have held that the guidelines should be interpreted as statutes and have applied principles of statutory construction when reviewing guidelines sentences or interpreting specific guideline provisions.[6] Moreover, because the guidelines prescribe punishment for offenses against the United States, they are penal statutes which must be construed strictly. *See Huntington* v. *Attrill*, 146 U.S. 657 (1892); *Khang*, 904 F.2d at 1222. One hundred and seventy years ago Chief Justice Marshall observed:

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.

United States v. *Wiltberger*, 18 U.S. (5 Wheat) 76, 95 (1820). This principle of strict construction is perhaps even more important today in light of "the broad and wide-ranging effects of the new Sentencing Guidelines." *Khang*, 904 F.2d at 1222 n.4.

The language at issue in this case appears in guideline section 1B1.2, as it existed at the time of Mr. Braxton's sentencing in July, 1988:

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[6] *See, e.g., United States* v. *Foreman*, 905 F.2d 1335, 1339 (9th Cir. 1990); *United States* v. *Jimenez*, 897 F.2d 286, 287 (7th Cir. 1990); *Khang*, 904 F.2d at 1222; *United States* v. *Lewis*, 900 F.2d 877, 881 (6th Cir.), *cert. denied*, 111 S. Ct. 117 (1990); *United States* v. *Ogbeide*, 911 F.2d 793, 795 (D.C. Cir. 1990); *United States* v. *Worthy*, 915 F.2d 1514, 1516 (11th Cir. 1990); *United States* v. *Goldbaum*, 879 F.2d 811, 813 (10th Cir. 1989); *United States* v. *Reyes-Ruiz*, 868 F.2d 698, 703 (5th Cir. 1989); *United States* v. *Wickstrom*, 893 F.2d 30, 31 (3d Cir. 1989); *United States* v. *Correa-Vargas*, 860 F.2d 35, 38 (2d Cir. 1988).

> The court shall apply the offense guideline section in Chapter Two (Offense Conduct) most applicable to the offense of conviction. *Provided*, however, in the case of conviction by a plea of guilty or *nolo contendere* containing a stipulation that specifically establishes a more serious offense than the offense of conviction, the court shall apply the guideline in such chapter most applicable to the stipulated offense.* * *

U.S.S.G. § 1B1.2(a). More specifically in question is the meaning of the language "plea of guilty * * * containing a stipulation that specifically establishes a more serious offense than the offense of conviction." *Id.* 77.

The guidelines and the Sentencing Reform Act do not explicitly define the term "stipulation." Therefore, the plain meaning of "stipulation" is the starting point for analysis. *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917) ("the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms"). *See also Perrin* v. *United States*, 444 U.S. 37, 42 (1979) ("unless otherwise defined, words will be interpreted as taking their ordinary, contemporary common meaning").

The commonly accepted meaning of the term "stipulation" is "[a] material condition, requirement, or article in an agreement. The name given to any agreement made by the attorneys engaged on opposite sides of a cause (especially if in writing), regulating any matter incidental to the proceedings or trial." *Black's Law Dictionary* 1269 (5th ed. 1979). The courts have followed this definition by recognizing that "[t]he essence of a stipulation is an agreement of the parties, albeit a judicially sanctioned one." *United States* v. *Harris*, 542 F.2d 1283, 1297 (7th Cir.

1976).[7] Thus, stipulations are effective only when they are the product of mutual assent.[8]

The courts have not taken lightly the requirement for mutual assent. A simple concession by one party to facts establishing a crime is not sufficient to establish a stipulation. In *Harris*, the defendants offered to stipulate to the existence of a conspiracy. Defense counsel admitted in his opening statement to the jury that a conspiracy existed. The government sought to prove the existence of a conspiracy. Despite the apparent "agreement" between the parties that a conspiracy existed, the Court of Appeals for the Seventh Circuit held that no stipulation existed because no specific agreement to the stipulation appeared on the record. *Harris*, 542 F.2d at 1297. The teaching of *Harris* is clear: the parties must intend to enter into a stipulation; a stipulation may not be implied by the circumstances. *See also Golub* v. *J.W. Gant & Assocs.*, 863 F.2d 1516, 1520 (11th Cir. 1989) (party did not "stipulate" to jury verdict by rejecting the court's offer to resubmit the case to the jury).

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[7] *See also United States* v. *McKinney*, 758 F.2d 1036, 1047 (5th Cir. 1985) (stipulation is akin to a contract where the parties are bound only to the terms actually agreed upon); *Rice* v. *Glad Hands, Inc.*, 750 F.2d 434, 438 (5th Cir. 1985) (stipulation is like a contract).

[8] *See, e.g., Harris*, 542 F.2d at 1297; *United States* v. *McKinney*, 758 F.2d 1036, 1047 (5th Cir. 1985); *James* v. *Wallace*, 533 F.2d 963, 967 n.7 (5th Cir. 1976); *United States* v. *McGregor*, 529 F.2d 928, 931 (9th Cir. 1976).

The Latin root of the term, "stipulatio," is defined as a technical juridical term: a promise given on demand, an engagement, agreement, bargain, covenant, stipulation, obligation. It is synonymous with "pactum," an agreement resulting from a bargain. Lewis & Short, *A Latin Dictionary* 1761 (Clarendon Press, Oxford, 1879) (1969 printing).

The terms "containing" and "specifically" in guideline section 1B1.2 also show that a defendant's mere acknowledgment of the government's statement of facts at a Rule 11 hearing is inadequate to establish a section 1B1.2 stipulation. The language "plea of guilty *** containing a stipulation" implies that the stipulation is incorporated into a plea agreement. Furthermore, the adverb "specifically" indicates that the stipulation must particularize facts with the intent of establishing the more serious offense and explain how those facts constitute the more serious offense.

In addition to examining the plain meaning of a statutory term and the use of that term in a given statute, this Court has considered the meaning of the term in the context of the statute as a whole. *Richards* v. *United States*, 369 U.S. 1, 11 (1962); *United States* v. *Morton*, 467 U.S. 822, 828 (1984). When the same term is used in different sections of a statute, that term should be given a single meaning. *Barnson* v. *United States*, 816 F.2d 549, 554 (10th Cir.), *cert. denied*, 484 U.S. 896 (1987); *ICC Indus., Inc.* v. *United States*, 812 F.2d 694, 700 (Fed. Cir. 1987). The term "stipulation" should therefore be read as meaning the same thing in section 1B1.2 of the Sentencing guidelines as in section 6B1.4 of the guidelines.

Section 6B1.4 of the guidelines makes clear that the Sentencing Commission intended for factual stipulations to be part of a plea agreement. In pertinent part, section 6B1.4 reads:

> (a) A plea agreement may be accompanied by a written stipulation of facts relevant to sentencing ***
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> *****

> (c) A district court may, by local rule, identify categories of cases for which the parties are authorized to make the required stipulation orally, on the record, at the time the plea agreement is offered.[9]

U.S.S.G. §6B1.4, p.s.

The commentary states:

> [b]ecause of the importance of the stipulations and the potential complexity of the factors that can affect the determination of sentences, stipulations ordinarily should be in writing. However, exceptions to this practice may be allowed by local rule. The Commission intends to pay particular attention to this aspect of the plea agreement procedure as experience under the guidelines develops.

U.S.S.G. §6B1.4, p.s., comment. Section 6B1.4 contemplates stipulations only as part of a negotiated plea agreement. Thus, a logical reading of sections 1B1.2 and 6B1.4 together compels the conclusion that the Sentencing Commission intended that a stipulation be established only as part of a plea agreement, especially a written agreement.

In summary, accepted principles of statutory construction show that the term "stipulation" in section

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[9] The Rules of the United States District Court for the District of Maryland provide for oral rather than written stipulations pursuant to plea agreements only in misdemeanor cases: "Pursuant to Section 6B1.4(c) of the Sentencing Guidelines and Policy Statements of the United States Sentencing Commission, a judicial officer taking a plea of guilty or *nolo contendere* pursuant to a plea agreement, for any offense or offenses not above the level of a Class A misdemeanor (which includes all misdemeanors and infractions), may permit the parties to make any required stipulation of facts relative to sentencing orally, on the record, at the time the plea agreement is offered, in lieu of a written stipulation." U.S. Dist. Ct. Local R. 213.3.

1B1.2 of the Sentencing Guidelines refers to a negotiated agreement where the parties bargain for a factual agreement that specifically establishes a more serious offense than the offense of conviction. In Mr. Braxton's case, there was no plea agreement and no factual stipulation.

B. The district court erroneously calculated the base offense level in this case because Mr. Braxton did not enter a guilty plea containing a stipulation that specifically established a more serious offense than the offense of conviction.

In this case, Mr. Braxton did not enter into a stipulation specifically establishing a more serious offense than the offense of conviction. Mr. Braxton pleaded guilty to assault on a federal officer (count two) and use of a firearm during a crime of violence (count three) without entering into a plea agreement of any kind. J.A. 4, 19. He persisted in his plea of not guilty to the charge of attempted murder (count one). J.A. 5. Although the government moved to dismiss the attempted murder charge after sentencing (J.A. 79), no agreement existed that this would be done. J.A. 13. In addition, defense counsel and the government did not negotiate the statement of facts read by the government at Mr. Braxton's Rule 11 proceeding. The factual statement was not designated a stipulation. J.A. 95. The government offered the statement of facts solely as a factual basis for the guilty pleas to counts one and two.

Mr. Braxton steadfastly denied committing the more serious offense of attempted murder. J.A. 76. Shortly after the government presented the facts that it could prove had the case gone to trial, Mr. Braxton's counsel explained that Mr. Braxton was not admitting an attempt to murder anyone. J.A. 22. This denial demonstrates Mr. Braxton's lack of assent to a stipulation establishing attempted murder. Mr. Braxton's lack of assent to a stip-

ulation specifically establishing a more serious offense also is manifest in defense counsel's statement at sentencing that "[i]f Mr. Braxton was really stipulating to the fact that he attempted to murder marshals, he would have pled guilty to attempting to murder marshals." J.A. 75. At sentencing, the district court expressly ruled that there had been no stipulation: "And I realize, and there certainly is no indication, [your lawyer has] made it absolutely clear throughout that, Mr. Braxton, on your behalf, there's been no stipulation to Attempted Murder, and the record's clear on that." J.A. 77.

C. The legislative history of the Sentencing Reform Act and the Sentencing Guidelines, together with recent commentary, demonstrate that Congress and the Sentencing Commission intended a section 1B1.2 stipulation to be contained within a plea agreement.

The legislative history of the Sentencing Reform Act demonstrates that the guideline applicable to an offense more serious than the offense of conviction does not apply unless the elements of the more serious offense are established as part of a plea agreement. The House Report on the 1984 Act formulated the general rule that penalties must be based strictly on the offense of conviction. The House Report also describes the limited exception to the general rule:

> There is one exception to the restriction on the court's inability to consider facts regarding the offense that were not proved but, if proved, would have established guilt of a more serious offense. Such facts may be considered if stipulated *as part of a plea agreement*. For example, if the defendant pled guilty to theft, but admitted the elements of robbery as part of the agreement, the guideline for robbery could be applied. The sentence, of course, could not exceed the maximum sentence for the theft.

H. Rep. No. 98-1017, 98th Cong., 2d Sess. 99 (1984) (emphasis added). This language reflects congressional intent to restrict the use of a higher offense level to situations involving a negotiated plea agreement.

Section 1B1.2 of the Sentencing Guidelines represents the Commission's adoption of the provisions set forth in the House Report. The Sentencing Commission expressly relied on the House Report in the commentary to guideline section 1B1.2:

> However, there is a limited exception to this general rule. Where a stipulation as part of a plea of guilty or *nolo contendere* specifically establishes facts that prove a more serious offense or offenses than the offense or offenses of conviction, the court is to apply the guideline most applicable to the more serious offense or offenses established. *** For example, if the defendant pleads guilty to theft, but admits the elements of robbery as part of the plea agreement, the robbery guideline is to be applied. The sentence, however, may not exceed the maximum sentence for theft. *See* H. Rep. 98-1017, 98th Cong., 2d Sess. 99 (1984).

U.S.S.G. §1B1.2, comment. (n.1). Thus, the legislative history of the Sentencing Reform Act and the commentary to section 1B1.2 establish that Congress and the Commission intended that the narrow exception to section 1B1.2 apply only to situations in which a plea bargain has been struck.

Recent commentary by the Chairman of the United States Sentencing Commission and the General Counsel to the Commission explains that the stipulation proviso of section 1B1.2 provides "an important but limited exception to the general" rule that the offense of conviction provides the starting point for application of the guidelines. Wilkins & Steer, *Relevant Conduct: The Cor-*

nerstone of the Federal Sentencing Guidelines, 41 S.C.L. Rev. 495, 500-501 (1990). The authors further explain that the stipulation proviso only applies when the defendant expressly agrees to use of the guideline applicable to the more serious charge:

> It is not enough that the defendant simply admit at sentencing to more serious criminal activity than the charged offense proscribes; rather, a *negotiated* quid pro quo as part of a plea of guilty or nolo contendere is contemplated. In such a case, the Government agrees to forego prosecution of a more serious charge in exchange for gaining application of the guideline applicable to the more serious charge. The defendant agrees to the use of that guideline in exchange for limiting his statutory exposure and, perhaps, avoiding other guideline and statutory consequences.

Id. at 501 (emphasis added) (citations omitted).

For example, a defendant may avoid application of the career offender provisions of the guidelines by negotiating a plea to a less serious offense which does not trigger those provisions while stipulating to a more serious offense. *Id.* at 501-02 n.42. The effect is to limit statutory exposure in return for an increase in the base offense level and resulting guideline range. A defendant also may become statutorily eligible for probation by pleading to an offense less than a Class A or B felony, but stipulating to a higher offense. *Id.* at 501-02 n.42.

In contrast to these examples, the stipulation proviso of section 1B1.2 offered no advantages to Mr. Braxton. Whether Mr. Braxton was sentenced pursuant to the guideline for attempted murder (U.S.S.G. § 2A2.1) or that applicable to assault on a federal officer (U.S.S.G. § 2A2.2), the resulting guideline range remained substantially lower than the ten year statutory maximum for the

lesser offense of assault on federal officers. 18 U.S.C. § 111. (The attempted murder charge carried a twenty year statutory maximum under 18 U.S.C. § 1114.) Mr. Braxton had no need for a negotiated quid pro quo, and had nothing to gain from a plea agreement which could have resulted in a stipulation to the greater offense of attempted murder. Because Mr. Braxton's case did not involve a negotiated quid pro quo as part of a plea agreement, the stipulation proviso of section 1B1.2 should not have been triggered.

In this case, the parties agreed, and the lower court found, that there was no plea agreement. J.A. 4, 13, 19. The ruling of the court of appeals that Mr. Braxton had entered into a stipulation in the absence of a plea agreement is inconsistent with the intent of Congress and the Sentencing Commission regarding the operation of guideline section 1B1.2.

D. Developing case law under the Sentencing Guidelines interprets "stipulation" as used in section 1B1.2 as a formal agreement between the parties.

Several courts of appeals have construed the term stipulation in section 1B1.2. The Second, Fifth, and Tenth Circuits have recognized that the Sentencing Commission must have intended a stipulation under section 1B1.2 to be part of a plea agreement between the parties, rather than merely an acknowledgment of a recitation of facts during a Rule 11 or sentencing hearing. *See, e.g., United Staes* v. *McCall*, 915 F.2d 811, 816 n.4 (2d Cir. 1990); *United States* v. *Rutter*, 897 F.2d 1558, 1561 (10th Cir.), *cert. denied*, 111 S. Ct. 88 (1990); *United States* v. *Strong*, 891 F.2d 82, 85 (5th Cir. 1989); *United States* v. *Warters*, 885 F.2d 1266, 1273 n.5 (5th Cir. 1989); *United States* v. *Guerrero*, 863 F.2d 245, 248 (2d Cir. 1988).

The Second Circuit requires "that any stipulation be a part of the plea agreement, whether oral or written." *McCall*, 915 F.2d at 816 n.4. In *McCall*, the defendant, pursuant to a plea agreement, pleaded guilty to aggravated assault (in aid of racketeering). *Id.* at 812. Under the plea agreement, he agreed to admit to the court his participation in four shootings. *Id.* Based on the facts admitted by the defendant at the Rule 11 hearing, the court concluded that the defendant had "acted with a 'depraved indifference to human life'" and determined the applicable guideline range under the more severe guideline for assault with intent to commit murder rather than the guideline for aggravated assault. *Id.* at 813. On appeal, the Second Circuit reversed because the district court improperly based the applicable guideline section on the defendant's real conduct rather than the offense to which he pleaded guilty pursuant to a written plea agreement with the government. *Id.* at 814.

The appellate court declined to find a stipulation in part because of the importance of the reasonable expectations of the parties. These expectations cannot be fulfilled "unless the Guidelines section is determined solely on the basis of the offense of conviction, facts alleged in the information or indictment, and formal stipulations to facts establishing a more severe offense." *Id.* at 815. Because the government had failed to extract a section 1B1.2 stipulation during plea negotiations, the *McCall* court ruled that the defendant's "agreement to describe the four assaults at the time of his plea allocution does not constitute a stipulation to more severe offense conduct." *Id.* *McCall's* clear implication is that a stipulation under section 1B1.2 must be labelled as such.[10]

[10] The Fourth Circuit relied on *United States* v. *Correa-Vargas*, 860 F.2d 35 (2d Cir. 1988), in concluding that a defendant's agreement to a statement of facts offered at a Rule 11 hearing qualifies as a section 1B1.2 stipulation. *Correa-Vargas* is inapposite because the decision does not rest on application of section 1B1.2. Instead, the opinion affirms an upward departure and merely mentions section 1B1.2 in dicta.

The Fifth Circuit has stated with equal clarity that a defendant's admission to facts recited by the government at the Rule 11 hearing is not a stipulation within the meaning of section 1B1.2. *Warters*, 885 F.2d at 1273 n.5. In *Warters*, the defendant, pursuant to a plea agreement, pleaded guilty to misprision of a felony. The plea agreement said nothing about the defendant's membership in a conspiracy to distribute controlled illegal substances. At the Rule 11 hearing, however, the defendant admitted to facts showing that he was a member of the conspiracy. The court ruled that the case did not involve "a stipulation * * * specifically establishing a more serious offense." *Id.* The court noted: "Warter's guilt of misprision of the conspiracy did not depend on his having been a member of the conspiracy; nor was there any formal stipulation of his guilt of conspiracy." *Id.*

In short, the circuit courts of appeals have reasoned that the stipulation contemplated under section 1B1.2 is a formal agreement between the government and the defendant. An agreement to the statement of facts recited by the government at a Rule 11 hearing cannot substitute for the formal stipulation contemplated by section 1B1.2.

II. A REQUIREMENT THAT A STIPULATION BE PART OF A NEGOTIATED PLEA AGREEMENT FURTHERS IMPORTANT GOALS OF THE CRIMINAL JUSTICE SYSTEM.

A requirement that a section 1B1.2 stipulation be part of a negotiated plea agreement serves two purposes which

are essential to the fair and efficient operation of the criminal justice system. First, it ensures that a defendant enters his plea knowingly and voluntarily with an awareness of the consequences of the stipulation. Second, it preserves the value of guilty pleas and plea bargaining to the criminal justice system.

The conclusive nature of a stipulation mandates that a defendant understand the nature and consequences of the stipulation. A stipulation is a concession that some alleged fact is true. "Stipulations of fact fairly entered into are controlling and conclusive and courts are bound to enforce them." *Osborne* v. *United States*, 351 F.2d 111, 120 (8th Cir. 1965). A stipulation containing all of the facts necessary to determine guilt is invalid unless the defendant "knew what he was doing and understood the consequences of his stipulation." *United States* v. *Stalder*, 696 F.2d 59, 62 (8th Cir. 1982).[11]

Rule 11 of the Federal Rules of Criminal Procedure establishes a procedure to ensure that a defendant enters a plea knowingly and voluntarily with an understanding of the effect of any agreements or stipulations with the government. Rule 11(d) mandates an inquiry by the court into the impact of plea discussions on the defendant's willingness to plead guilty. Furthermore, under Rule 11(e), the plea agreement must be disclosed in open court. If the section 1B1.2 stipulation to a more serious offense is

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[11] *See also United States* v. *Lyons*, 898 F.2d 210, 215 (1st Cir.), *cert. denied*, 111 S. Ct. 285 (1990) (district judge must make special effort to establish that waiver is knowing and voluntary and to impress upon the defendant the significance of the choice to proceed by stipulation); *Cox* v. *Hutto*, 589 F.2d 394, 395-96 (8th Cir. 1979) (stipulation without defendant's consent resulting in sentencing enhancement after guilty finding invalid).

contained within a plea agreement, then these Rule 11 inquiries will ensure that the defendant is aware of the existence and effect of the stipulation. Moreover, the Rule 11 proceeding will uncover the impact of the stipulation on the defendant's entry of a knowing and voluntary plea.

Because of the procedures followed in this case, there is no assurance that Mr. Braxton knew that admitting the facts proffered in support of his guilty plea to assault while denying guilt of attempted murder could have the effect of a section 1B1.2 stipulation subjecting him to punishment for attempted murder. Even the district court did not view Mr. Braxton's agreement to the statement of facts offered in support of the plea to assault as a section 1B1.2 stipulation to the more serious offense of attempted murder. The court ruled that "there's been no stipulation to Attempted Murder, and the record's clear on that." J.A. 77. Nevertheless, the district court treated the facts for sentencing purposes as the practical equivalent of a guilty plea to attempted murder, because in the court's view the facts "added up" to that offense. J.A. 77. The judicial finding of a stipulation was not made until the case reached the court of appeals. J.A. 98-99. Therefore, it is not surprising that the district judge never inquired whether Mr. Braxton understood the consequences of the supposed stipulation.

The record shows that Mr. Braxton did not agree to the government's statement of facts knowing that his agreement would have the consequence of a stipulation to attempted murder. To the contrary, Mr. Braxton's unwillingness to agree to such a stipulation is shown by his lawyer's statement that Mr. Braxton "obviously, is not admitting he attempted to specifically murder anyone." J.A. 22. Braxton himself emphatically stated that "I was not trying to kill the marshals, harm the marshals. I was

—it was all happening in such a fast instant that the only thing I could think of doing was defending my home and trying to keep them from taking me back to St. Elizabeth's [sic]." J.A. 76. These statements negate any purpose on Mr. Braxton's part to enter a guilty plea which subjected him to sentencing based on a crime that was neither proved at trial nor admitted by him. *Cf. Brookhart* v. *Janis*, 384 U.S. 1, 5-8 (1965) (petitioner did not knowingly agree to be tried in a proceeding which was the equivalent of a guilty plea where he expressed his desire to plead not guilty).

In addition to ensuring that a defendant understands the nature and consequences of a section 1B1.2 stipulation, a requirement that a stipulation be contained within a negotiated plea agreement would reduce the risks and uncertainties that the Fourth Circuit's decision has injected into the plea process. The criminal justice system has come to depend upon pleas of guilty. Fed. R. Crim. P. 11 advisory committee's note to 1974 amends. Few would dispute that guilty pleas are essential to the efficient operation of the criminal justice system. *See Santobello* v. *New York*, 404 U.S. 257, 260 (1971). The Fourth Circuit's opinion in this case, however, establishes law that may result in the complete breakdown of the plea process.

The Fourth Circuit encourages district courts to scrutinize the statement of facts offered in support of a guilty plea to a lesser offense and to draw inferences from those facts to determine whether they establish a more serious offense. The Fourth Circuit's opinion, however, provides no guidance to district courts regarding the procedures to be followed or the standard of proof required for determining that a more serious offense has been established.[12]

[12] The failure of the court of appeals to delineate a standard for determining whether a stipulation specifically establishes a more serious offense presents an unacceptable risk that a defendant will be sentenced for an offense that he did not commit. The Fifth Circuit in *United States* v. *Martin*, 893 F.2d 73, 75 (5th Cir. 1990), recognized this risk associated with a section 1B1.2 stipulation. Thus, the Fifth Circuit requires the district court to follow the directive of Rule 11(f) and determine that the stipulated conduct constitutes a crime. *Id.*

In Mr. Braxton's case, although the district court's conclusion that the facts "added up" to attempted murder involved a crucial inference as to Mr. Braxton's state of mind, the court of appeals' opinion subjected this finding to review under a clearly erroneous standard. J.A. 97.

The dangers of the Fourth Circuit's unstructured approach to determining whether a stipulation specifically establishes a more serious offense are most evident in cases where crimes of varying levels of severity are based upon the same acts, separated only by different mental states. For example, a defendant who is charged with voluntary manslaughter may plead guilty as charged only to have the district court decide that the facts add up to second degree murder and therefore apply the higher base offense level applicable to second degree murder. Similarly, the court of appeals' opinion would permit a defendant who pleads guilty to bank larceny to receive a guideline sentence for bank robbery under section 1B1.2 if the court found a taking by intimidation. As a result, the defendant would be sentenced according to the more severe sentencing guideline applicable to an uncharged and unproved greater offense. Such a system defeats congressional goals in the Sentencing Reform Act of 1984 to "structure judicial sentencing discretion *** and make criminal sentencing fairer and more certain." S. Rep. No. 225, 98th Cong., 2d Sess. 65, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3248.

As a practical matter, the Fourth Circuit's opinion forces the defendant into making an immediate assessment of the facts proffered by the government at a Rule 11 hearing without having had a previous opportunity to review those facts. Yet, acknowledging a statement of facts at a Rule 11 hearing may have serious and irreparable consequences for a defendant. Under such circumstances, a defendant will be reluctant to enter a guilty plea for fear that the district court will find that he "stipulated" to a more serious offense, thus subjecting him to sentencing according to a higher offense level. If the stipulation were part of a plea agreement, however, the defendant would have an adequate opportunity to review the stipulation in advance of the Rule 11 hearing and could assess its potential impact.

The Fourth Circuit's opinion also allows a district court to apply the stipulation proviso of section 1B1.2 in a wide variety of circumstances, regardless of whether the parties intended to enter into such a stipulation. The opinion permits a prosecutor to avoid an express discussion of the elements of a more serious offense during plea negotiations or during the Rule 11 hearing. Later, however, the prosecutor may urge the probation office and the district court to infer guilt of a greater offense from the facts offered at the Rule 11 hearing. The prosecutor then could obtain application of a more severe offense guideline based on section 1B1.2 without the defendant's agreement and without meeting the higher burden of proof associated with a trial. Thus, the absence of a requirement that stipulations be part of a negotiated plea agreement could result in fundamental misunderstandings about the value of a plea bargain and could destroy the integrity of the plea bargaining process.

Furthermore, the opinion of the court of appeals creates insurmountable barriers for a defendant who wishes to

avoid the effect of a section 1B1.2 stipulation. Mr. Braxton and his attorney denied the more serious offense of attempted murder, but the appellate court found this denial insufficient to negate a section 1B1.2 stipulation to the greater offense of attempted murder. A defendant's inability to avoid a stipulation to a more serious offense may eliminate the incentive to enter a guilty plea. On the contrary, he may have no choice but to plead not guilty to lesser offenses for fear of being sentenced for a greater offense. In this situation, a defendant risks little or nothing by standing trial. The end result will be a reduction in the number of guilty pleas and a concomitant increase in criminal trials.[13]

In conclusion, a requirement that a section 1B1.2 stipulation be part of a plea agreement would ensure that a defendant understands the nature and consequences of the stipulation and would safeguard the fundamental value of guilty pleas in the criminal justice system.

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[13] The court of appeals' opinion also raises a host of other problems under the Sentencing Guidelines. For example, it is unclear whether a defendant must accept responsibility for the greater offense to which he has stipulated in order to gain a two level offense level reduction under guideline section 3E1.1. If the defendant expressly has entered into a stipulation with the government establishing a greater offense as part of a negotiated quid pro quo, then it would be fair to require him to accept responsibility for the conduct underlying the greater offense. If, however, a stipulation is not required to be part of a negotiated plea agreement, then the defendant may be denied a reduction in the offense level merely because he has not accepted responsibility for the greater offense. Because the determination that there has been a stipulation within the meaning of section 1B1.2 often would not take place until the sentencing hearing, the denial of credit for acceptance of responsibility likely would occur in cases where a stipulation was not part of a negotiated plea agreement.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Fourth Circuit should be reversed and the case should be remanded for resentencing in conformity with Sentencing Guideline section 1B1.2.

Respectfully submitted,

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APPENDIX

APPENDIX

U.S. Const. amend. V

"No person shall be * * * deprived of life, liberty, or property, without due process of law * * *."

United States Sentencing Guidelines[1]

§ 1B1.2. *Applicable Guidelines*

(a) The court shall apply the offense guideline section in Chapter Two (Offense Conduct) most applicable to the offense of conviction. *Provided*, however, in the case of conviction by a plea of guilty * * * containing a stipulation that specifically establishes a more serious offense than the offense of conviction, the court shall apply the guideline in such chapter most applicable to the stipulated offense. Similarly, stipulations to additional offenses are treated as if the defendant had been convicted of separate counts charging those offenses.

Commentary

Application Notes:

1. This section provides the basic rules for determining the guidelines applicable to the offense conduct under Chapter Two (Offense Conduct). As a general rule, the court is to apply the guideline covering the offense conduct most applicable to the offense of conviction. Where a particular statute proscribes a variety of conduct which might constitute the subject of different guidelines, the court will decide which guideline applies based upon the nature of the offense conduct charged.

   However, there is a limited exception to this general rule. Where a stipulation as part of a plea of guilty or *nolo contendere* specifically establishes facts that

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[1] United States Sentencing Commission, *Guidelines Manual* (June 15, 1988).

prove a more serious offense or offenses than the offense or offenses of conviction, the court is to apply the guideline most applicable to the more serious offense or offenses established. The sentence that may be imposed is limited, however, to the maximum authorized by the statute under which the defendant is convicted. *See* Chapter Five, Part G (Implementing the Total Sentence of Imprisonment). For example, if the defendant pleads guilty to theft, but admits the elements of robbery as part of the plea agreement, the robbery guideline is to be applied. The sentence, however, may not exceed the maximum sentence for theft. *See* H. Rep. 98-1017, 98th Cong., 2d Sess. 99 (1984). Similarly, if the defendant pleads guilty to one robbery but admits the elements of two additional robberies as part of a plea agreement, the guideline applicable to three robberies is to be applied.

The exception to the general rule has a practical basis. In cases where the elements of an offense more serious than the offense of conviction are established by the plea, it may unduly complicate the sentencing process if the applicable guideline does not reflect the seriousness of the defendant's actual conduct. Without this exception, the court would be forced to use an artificial guideline and then depart from it to the degree the court found necessary based upon the more serious conduct established by the plea. The probation officer would first be required to calculate the guideline for the offense of conviction. However, this guideline might even contain characteristics that are difficult to establish or not very important in the context of the actual offense conduct. As a simple example, § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft), contains monetary distinctions which are more significant and more detailed than the monetary distinctions in § 2B3.1 (Robbery). Then, the probation officer might need to calculate the robbery guideline to assist the court in determining the appropriate degree of departure in a case in which the defendant pled guilty to theft but admitted committing the robbery. This cumbersome, artificial procedure is avoided by using the exception rule in guilty or *nolo contendere* plea cases where it is applicable.

As with any plea agreement, the court must first

determine that the agreement is acceptable, in accordance with the policies stated in Chapter Six, Part B (Plea Agreements). The limited exception provided here applies only after the court has determined that a plea, otherwise fitting the exception, is acceptable.

2. Section 1B1.2(b) directs the court, once it has determined the applicable guideline (*i.e.*, the applicable guideline section from Chapter Two) under § 1B1.2(a) to determine any applicable specific offense characteristics (under that guideline), and any other applicable sentencing factors pursuant to the relevant conduct definition in § 1B1.3. Where there is more than one base offense level within a particular guideline, the determination of the applicable base offense level is treated in the same manner as a determination of a specific offense characteristic. Accordingly, the "relevant conduct" criteria of § 1B1.3 are to be used, unless conviction under a specific statute is expressly required.

3. In many instances, it will be appropriate that the court consider the actual conduct of the offender, even when such conduct does not constitute an element of the offense. As described above, this may occur when an offender stipulates certain facts in a plea agreement. It is more typically so when the court considers the applicability of specific offense characteristics within individual guidelines, when it considers various adjustments, and when it considers whether or not to depart from the guidelines for reasons relating to offense conduct. *See* §§ 1B1.3 (Relevant Conduct) and 1B1.4 (Information to be Used at Sentencing).

§ 6B1.4. *Stipulations* (Policy Statement)

(a) A plea agreement may be accompanied by a written stipulation of facts relevant to sentencing. Except to the extent that a party may be privileged not to disclose certain information, stipulations shall:

(1) set forth the relevant facts and circumstances of the actual offense conduct and offender characteristics;

(2) not contain misleading facts; and

(3) set forth with meaningful specificity the reasons why the sentencing range resulting from the proposed agreement is appropriate.

(b) To the extent that the parties disagree about any facts relevant to sentencing, the stipulations shall identify the facts that are in dispute.

(c) A district court may, by local rule, identify categories of cases for which the parties are authorized to make the required stipulation orally, on the record, at the time the plea agreement is offered.

(d) The court is not bound by the stipulation, but may with the aid of the presentence report, determine the facts relevant to sentencing.

Supreme Court, U.S.
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No. 90-5358 (1)

In the Supreme Court of the United States

OCTOBER TERM, 1990

THOMAS BRAXTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a defendant's agreement to a statement of facts that establishes all the elements of a more serious offense than the offense of conviction is a "stipulation that specifically establishes" the more serious offense within the meaning of Sentencing Guideline 1B1.2.

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals, Pet. App. 1-8, is reported at 903 F.2d 292.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1990. The petition for a writ of certiorari was filed on August 3, 1990, and was granted on November 13, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND RULES INVOLVED

18 U.S.C. 3553 provides, in pertinent part:

> (a) *Factors to be considered in imposing a sentence.* The court shall impose a sentence suf-

ficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;

Sentencing Guideline 1B1.2 provides, in pertinent part:

1B1.2. *Applicable Guidelines.*

(a) Determine the offense guideline section in Chapter Two (Offense Conduct) most applicable to the offense of conviction (*i.e.*, the offense conduct charged in the count of the indictment or information of which the defendant was convicted). *Provided*, however, in the case of conviction by a plea of guilty or *nolo contendere* containing a stipulation that specifically establishes a more serious offense than the offense of conviction, determine the offense guideline section in Chapter Two most applicable to the stipulated offense.

(b) After determining the appropriate offense guideline section pursuant to subsection (a) of this section, determine the applicable guideline range in accordance with § 1B1.3 (Relevant Conduct).

(c) A conviction by a plea of guilty or *nolo contendere* containing a stipulation that specifically establishes the commission of additional offense(s) shall be treated as if the defendant had been convicted of additional count(s) charging those offense(s).

Sentencing Guideline 6B1.4 provides, in pertinent part:

6B1.4. *Stipulations* (Policy Statement)

(a) A plea agreement may be accompanied by a written stipulation of facts relevant to sentencing. Except to the extent that a party may be privileged not to disclose certain information, stipulations shall:

> (1) set forth the relevant facts and circumstances of the actual offense conduct and offender characteristics;
>
> (2) not contain misleading facts; and
>
> (3) set forth with meaningful specificity the reason why the sentencing range resulting from the proposed agreement is appropriate.

(b) To the extent that the parties disagree about any facts relevant to sentencing, the stipulation shall identify the facts that are in dispute.

(c) A district court may, by local rule, identify categories of cases for which the parties are authorized to make the required stipulation orally, on the record, at the time the plea agreement is offered.

(d) The court is not bound by the stipulation, but may with the aid of the presentence report, determine the facts relevant to sentencing.

STATEMENT

Petitioner was indicted in the United States District Court for the District of Maryland on one count of attempting to murder a federal officer, in violation of 18 U.S.C. 1114; one count of assaulting a federal officer, in violation of 18 U.S.C. 111; and one count of using a firearm in the commission of a crime of violence, in violation of 18 U.S.C. 924(c). J.A. 2-3. Petitioner entered a plea of not guilty to the at-

tempted murder count, and pleas of guilty to the assault and firearms counts. *Id.* at 5. The district court sentenced him to consecutive terms of 63 months' imprisonment on the assault count and 60 months' imprisonment on the firearms count, to be followed by a three-year term of supervised release. *Id.* at 82-83.

1. The facts underlying petitioner's convictions are not in dispute. At the plea hearing, the government stated that, if the case went to trial, it was prepared to prove that the following events occurred. J.A. 16-18.

Petitioner was committed to St. Elizabeth's Hospital in the District of Columbia in September 1974, when he was found not guilty by reason of insanity after being charged with bank robbery. He was subsequently discharged from the hospital on conditional release status, but was still required to report regularly to the outpatient department. At one point, he sought to be released from his reporting obligation, but his request was denied. When he subsequently failed to report for outpatient treatment as required, a warrant was issued for his arrest. J.A. 36.

On June 10, 1988, after learning that petitioner was living in Mt. Rainier, Maryland, four deputy United States marshals went to petitioner's apartment and knocked on the door. Although no one answered the door, the marshals could hear movement in the apartment. They knocked again, identified themselves, and still received no response. The marshals then unlocked the door with a key supplied by the landlord, knocked again, identified themselves, and announced their purpose. A security chain barred their entry into the apartment. As one of the marshals kicked the door open, petitioner fired a shot through the door opening in the direction of the marshals. The bullet embedded itself in the door just above the doorknob and the door snapped shut. J.A. 16-17.

After a short pause, the marshals again announced their presence and kicked open the door. At that point, petitioner fired another shot through the doorway. That bullet lodged in the door about five feet above the floor. The marshals then withdrew and took cover. J.A. 17-18. Petitioner told the marshals that he was not coming out, that he did not want to go back to the hospital, and that if the marshals came inside he would "kill them or blow their head[s] off." *Id.* at 18.

The marshals called for reinforcements, and the local police crisis intervention team arrived and took over. The area was barricaded and nearby buildings were evacuated. When the crisis intervention team asked petitioner to leave the apartment, he said he was not coming out and added, "I want you to come in and get me. I want to kill you." J.A. 18. Petitioner fired two more shots before he was eventually subdued with tear gas and arrested. A .38 caliber revolver was seized from petitioner at the time of his arrest. After his arrest, petitioner stated that he knew the men knocking on the door were United States marshals, but that he fired at them because he did not want to return to the hospital. *Id.* at 17-18.

2. Petitioner agreed with the government's statement of the facts, with two exceptions. First, petitioner recalled that he fired the first two shots at the same time. Second, petitioner stated that the gun was not on his person when he was arrested, but was found inside his apartment. J.A. 19. The government agreed that the gun was found in the apart-

ment, but noted that petitioner was the only person in the apartment at the time he was arrested. With those corrections, petitioner's counsel said that the government's statement of facts was "accurate." The district court asked petitioner: "[I]s that what happened?" Petitioner responded in the affirmative. *Ibid.*

Petitioner entered pleas of guilty to the assault and firearms counts. His counsel explained that petitioner did not have a formal agreement with the prosecutor to dismiss the attempted murder count, J.A. 5, but that counsel "did discuss the possibility that at sentencing the Government may well be induced to drop the remaining count," *id.* at 13. The prosecutor agreed that although there was no formal plea agreement, she had told defense counsel that the government would reassess the case and, if appropriate, dismiss the attempted murder count after sentencing. *Ibid.* The court then explained to petitioner that the government retained the option to pursue or dismiss that count at or after the time of sentencing. As the court put it, addressing the prosecutor, "I guess, frankly, it comes down to the fact that [if] you're satisfied with whatever sentence I impose, then you may evaluate and move to dismiss" the attempted murder count. *Ibid.* The prosecutor agreed that that was correct. *Ibid.*

The court then followed the procedures set forth in Federal Rule of Criminal Procedure 11 and determined that petitioner was entering his pleas of guilty voluntarily, knowingly, and intelligently. At the conclusion of the plea proceeding, the district court accepted petitioner's guilty pleas and scheduled a sentencing hearing. J.A. 26.

3. At the sentencing hearing, the district court calculated petitioner's presumptive sentencing range on the aggravated assault conviction to be 51 to 63 months in prison and imposed a sentence of 63 months' imprisonment. J.A. 82. The court's calculation was based on a total offense level of 23 and a criminal history category of II under the Sentencing Guidelines. J.A. 58. The court reached the offense level of 23 by starting with a base offense level of 20 for attempted murder (Guideline 2A2.1(a) (1989)) and adding three points because the victims were federal law enforcement officers (Guideline 3A1.2(a)).[1] J.A. 58. The court also sentenced petitioner to a mandatory, consecutive term of five years' imprisonment for using a firearm in the commission of a crime of violence. *Ibid.*; see 18 U.S.C. 924(c); Sentencing Guideline 2K2.4.

In deciding to apply the attempted murder Guideline, the court relied on Sentencing Guideline 1B1.2. That provision states that the sentencing court must apply the Guideline "most applicable to the offense of conviction," provided, however, that where a guilty plea or plea of *nolo contendere* "contain[s] a stipulation that specifically establishes a more serious offense than the offense of conviction," the court must apply the Guideline "most applicable to the stipulated offense." Although the court noted that petitioner had not formally stipulated to the offense of attempted murder, J.A. 77, the court explained that the facts "as set forth and acknowledged at the guilty plea proceeding * * * added up, in my judgment, to the—to a higher offense, and so therefore, I'm compelled to

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[1] Section 2A2.1 of the Guidelines was revised effective November 1, 1990 to provide a higher base offense level. See Sentencing Guidelines, App. C, Amendment 311 (1990).

find an offense level twenty," *ibid.* In the alternative, the district court said that it would depart upward and impose the same sentence even if petitioner were later found not to have stipulated to attempted murder. *Ibid.*

Petitioner's counsel argued that the proviso to Sentencing Guideline 1B1.2 did not apply because petitioner did not stipulate to a more serious offense, but only entered "a plea, like every other plea, where we acknowledge the statement of fact, said, that's what happened." J.A. 64. If petitioner had been sentenced under the Guideline for aggravated assault, his adjusted offense level would have been 18 points (the sum of the base offense level of 15 for aggravated assault under Sentencing Guideline 2A2.2(a), and three points because the victims were federal law enforcement officers under Sentencing Guideline 3A1.2 (a)). By that calculation, the presumptive sentence on the aggravated assault conviction would have been 30 to 37 months' imprisonment.[2]

After the district court imposed sentence, the government moved to dismiss the attempted murder count. J.A. 79.

4. The court of appeals affirmed. J.A. 86-101. It held that the district court properly applied the Guideline for attempted murder in accordance with Sen-

[2] The adjusted base levels under both the aggravated assault Guideline and the attempted murder Guideline did not take into account the 5 level enhancement for discharging a firearm (see Guidelines 2A2.1(b)(2)(A), and 2A2.2(b)(2)(A)), because petitioner was separately charged with the offense of using a firearm in connection with a crime of violence, 18 U.S.C. 924(c), and the Guidelines provide that the weapons-related enhancements do not apply when the defendant has also been convicted under Section 924(c). See Guideline 2K2.4, Application Note 2.

tencing Guideline 1B1.2. It reasoned that a "stipulation" within the meaning of Guideline 1B1.2 is not limited to a formal written stipulation, but includes as well "an agreement as to the facts that specifically establishes a more serious offense than the offense of conviction." J.A. 98; see *id.* at 87. The court found that petitioner's agreement with the government's proffer of facts constituted such a stipulation, *id.* at 98-99, and that the stipulated facts, which were not in dispute, "clearly support the district court's finding of attempted murder," *id.* at 98, 99. In light of its conclusion, the court of appeals did not reach the district court's alternative holding that petitioner's sentence could be upheld as an upward departure. *Id.* at 99.[3]

Judge Sprouse dissented with respect to the interpretation of Guideline 1B1.2. J.A. 100-101. On the facts of this case, he would have held that peti-

[3] On two other sentencing matters raised on appeal, the court of appeals sustained the district court's addition of three points to petitioner's offense level because his victims were law enforcement officers, J.A. 99-100, and reversed the district court's determination that petitioner's mental status prevented the court from awarding him a two-point credit for acceptance of responsibility, *id.* at 89-94. Neither ruling is challenged in this Court.

On remand, the district court determined that petitioner was entitled to the two-point reduction for acceptance of responsibility and imposed a term of 51 months' imprisonment on the aggravated assault conviction. J.A. 103-104. That reduction decreased petitioner's Guideline range to between 41 and 51 months' imprisonment. If petitioner had been found not to have stipulated to attempted murder, the two-point reduction for acceptance of responsibility would have reduced petitioner's total offense level to 16, and his Guidelines sentencing range to between 24 and 30 months' imprisonment.

tioner did not stipulate to the commission of the offense of attempted murder. *Id.* at 101.[4]

SUMMARY OF ARGUMENT

Sentencing Guideline 1B1.2 provides that when a defendant pleads guilty to an offense but stipulates to the commision of a more serious offense, the court must look to the Guideline for the more serious offense in selecting the appropriate sentence. The question in this case is whether petitioner's agreement to the government's factual proffer at his plea hearing is a stipulation within the meaning of Guideline 1B1.2.

A. Petitioner, who entered a plea of guilty to assault, agreed to facts establishing all the elements of attempted murder. The government stated that it could prove, if the case went to trial, that petitioner shot at four deputy United States marshals, knowing them to be marshals, and that he told the deputies he was trying to kill them. After correcting two minor aspects of the government's statement, petitioner and his counsel agreed that the factual proffer was accurate.

B. An agreement to facts establishing a particular offense is a "stipulation" within the meaning of

[4] Other than the court of appeals below, no other circuit court has determined whether a stipulation for purposes of Guideline 1B1.2 includes a defendant's agreement to the government's factual proffer at the plea hearing. The Fifth Circuit has suggested that a stipulation need not be part of a plea bargain, *United States* v. *Strong*, 891 F.2d 82, 85 (1989) (dictum), while the Second Circuit has voiced the contrary view, *United States* v. *McCall*, 915 F.2d 811, 816 n.4 (1990) (dictum). The Fifth Circuit has also suggested, again in dictum, that a stipulation must be "formal." *United States* v. *Warters*, 885 F.2d 1266, 1273 n.5 (1989).

Guideline 1B1.2. In both lay and legal parlance the term "stipulation" is regarded as synonymous with "agreement," particularly an agreement between attorneys in litigation. Application Note 1 to Guideline 1B1.2 supports this usage; it explains that "[i]n cases where the elements of an offense more serious than the offense of conviction are established by the plea," the calculation of the Guidelines sentence should "reflect the seriousness of the defendant's actual conduct."

C. Petitioner's policy argument—that defining "stipulation" as "agreement" for purposes of Guideline 1B1.2 would be unfair to defendants—ignores the situation of defendants before the Guidelines were promulgated. Under traditional sentencing practice, defendants knew little more than the minimum and maximum sentences authorized by statute. In addition, sentencing courts historically took into account the defendant's real offense in selecting the sentence. With the advent of the Guidelines, defendants are better able to inform themselves, before they decide to plead guilty, of the sentence they are likely to receive. And defendants may protect themselves from unfavorable factual stipulations simply by refusing to agree to the government's version of the facts. What defendants may not do, and what petitioner seeks to do here, is agree to facts establishing all the elements of an offense, while insisting that no "stipulation" has been made and that the court therefore may not sentence the defendant on the basis of conduct he has admitted committing.

ARGUMENT

Petitioner's Agreement To The Government's Statement Of Facts Constitutes A "Stipulation" Under Sentencing Guideline 1B1.2

After a valid conviction, "the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him"—that is, within the range permitted by the statute under which the defendant was convicted. *McMillan* v. *Pennsylvania*, 477 U.S. 79, 92 n.8 (1986) (quoting *Meachum* v. *Fano*, 427 U.S. 215, 224 (1976)). In deciding upon the appropriate sentence within that range, "[s]entencing courts necessarily consider the circumstances of an offense in selecting the appropriate punishment," and this Court has "consistently approved sentencing schemes that mandate consideration of facts related to the crime." *McMillan*, 477 U.S. at 92; cf. *Williams* v. *New York*, 337 U.S. 241, 247 (1949); *United States* v. *Grayson*, 438 U.S. 41, 50 (1978); *United States* v. *Tucker*, 404 U.S. 443, 446 (1972). Under traditional sentencing practice, a trial court could sentence a defendant according to his "real offense", even if that offense was more serious than the offense of conviction, as long as the sentence was within the range permitted by statute.[5] See, *e.g.*, *United States* v. *Castellanos*, 904

[5] Available evidence suggests that criminal sentencing decisions already are based heavily upon actual offense behavior as distinguished from the formal offense of conviction. Empirical studies of judicial sentencing indicate that in many jurisdictions prosecutorial decisions to reduce pending charges appear to have little or no impact on the sentence ultimately imposed. Efforts to study the same phenomenon by interviewing and other nonstatistical techniques confirm the impression that many judges currently disregard charge-reduction agreements and treat the defendant much the same as if he or she had been convicted on the initial charges.

Schulhofer, *Due Process of Sentencing*, 128 U. Pa. L. Rev. 733, 757 (1980); see M. Tonry & J. Coffee, *Enforcing Sentencing Guidelines: Plea Bargaining and Review Mechanisms*, in *The Sentencing Commission and Its Guidelines* 142, 153 (A. von Hirsch, K. Knapp & M. Tonry 1987) ("The term 'real-offense sentencing' is new, but the practice is not.").

F.2d 1490, 1494-1497 (11th Cir. 1990); *United States* v. *Alston*, 895 F.2d 1362, 1372 (11th Cir. 1990); *United States* v. *White*, 888 F.2d 490, 496 (7th Cir. 1989); *United States* v. *Scroggins*, 880 F.2d 1204, 1212-1214 (11th Cir. 1989), cert. denied, 110 S. Ct. 1816 (1990).

The Sentencing Commission "initially sought to adopt a real offense system," but found no practicable way to embody such a system in a set of guidelines. United States Sentencing Commission, *Guidelines Manual*, ch. 1, Pt. A, ¶ 4(a), at 1.4-1.5 (1990).[6] Instead of requiring "pure" real offense sentencing, the Sentencing Guidelines generally require that a defendant be sentenced in accordance with the "guideline section * * * most applicable to the offense of conviction," Guideline 1B1.2, and then provide for adjustments to account for specific features of the defendant's conduct. But the general rule is inapplicable if there is a "conviction by a plea of guilty or *nolo contendere* containing a stipulation that specifi-

[6] The Commission "found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with the need for speedy sentencing process given the potential existence of hosts of adjudicated 'real harm' facts in many typical cases." *Guidelines Manual*, ch. 1, Pt. A, ¶ 4(a), at 1.5.

cally establishes a more serious offense than the offense of conviction." In that event, Guideline 1B1.2 dictates that the defendant is to be sentenced in accordance with the "offense guideline * * * most applicable to the stipulated offense." *Ibid.*

A. Petitioner Agreed To Facts Establishing The Offense Of Attempted Murder

The statement of facts to which petitioner agreed established that he committed the offense of attempted murder. Section 1114 of Title 18 of the United States Code provides that "[w]hoever * * * attempts to kill any * * * deputy marshal * * * engaged in or on account of the performance of his official duties" is guilty of attempted murder. At the plea proceeding, petitioner admitted that the government's statement of facts was correct in all material respects. J.A. 19. The government's statement reflected that petitioner shot at the deputy marshals, that he admitted knowing they were United States marshals, and that he told the deputies he was trying to kill them because he "did not want to go back" to St. Elizabeth's Hospital. *Id.* at 17-18. As the court of appeals held, *id.* at 97, 99, the district court was correct in concluding that the facts set forth by the government and acknowledged by petitioner at the guilty plea proceeding established all the elements of attempted murder.[7]

[7] Contrary to petitioner's suggestion at the plea hearing, J.A. 22, the offense of attempted murder does not require proof that petitioner intended to murder a particular deputy marshal. An intentional act in callous and wanton disregard of the consequences to the marshals' lives—such as shooting through a doorway at chest and head level—is sufficient under 18 U.S.C. 1114. Cf. *United States* v. *Shaw*, 701 F.2d 367, 392-394 & n.20 (5th Cir. 1981), cert. denied, 465 U.S. 1067 (1984).

B. An Agreement To Facts Establishing A Particular Offense Is A "Stipulation" Within The Meaning Of Guideline 1B1.2

The proviso to Sentencing Guideline 1B1.2 requires the district court to base its sentence on the defendant's actual conduct, rather than the offense of conviction, whenever the case involves a guilty plea in which the defendant has made a "stipulation that specifically establishes a more serious offense than the offense of conviction." We agree with the court of appeals, J.A. 98, that a "stipulation" within the meaning of Guideline 1B1.2 includes an agreement to facts establishing a particular offense.

1. The court of appeals' definition of a "stipulation" as an "agreement" accords with the common definition of the term, as reflected in a variety of dictionaries, both general and legal. The term "stipulation" is typically regarded as synonymous with "agreement," particularly "an agreement between attorneys respecting the conduct of legal proceedings," *Webster's Third New International Dictionary of the English Language Unabridged* 2245 (1986), or "an agreement between attorneys that concerns business before a court," 9 *The Guide to American Law* 395 (1984). The leading law dictionary likewise defines "stipulation" in a manner consistent with the court of appeals' definition in this case:

> ["Stipulation" is] [t]he name given to any agreement made by the attorneys engaged on opposite sides of a cause (especially if in writing), regulating any matter incidental to the proceedings or trial, which falls within their jurisdiction. Voluntary agreement between op-

> posing counsel concerning disposition of some relevant point so as to obviate need for proof or to narrow range of litigable issues. An agreement, admission or confession made in a judicial proceeding by the parties thereto or their attorneys.

Black's Law Dictionary 1415 (6th ed. 1990) (citations omitted).

Defining "stipulation" as "agreement" furthers the purpose of the proviso to Guideline 1B1.2. Application Note 1 to Guideline 1B1.2 explains that the proviso

> has a practical basis. In cases where the elements of an offense more serious than the offense of conviction are established by the plea, it may unduly complicate the sentencing process if the applicable guideline does not reflect the seriousness of the defendant's actual conduct. Without this exception, the court would be forced to use an artificial guideline and then depart from it to the degree the court found necessary based upon the more serious conduct established by the plea. The probation officer would first be required to calculate the guideline for the offense of conviction. * * * Then, the probation officer might need to calculate the * * * guideline [for the more serious offense established by the stipulated facts] in determining the appropriate degree of departure in a case in which the defendant pled guilty to [one offense] but admitted committing [a more serious offense]. This cumbersome, artificial procedure is avoided by using the exception rule in guilty or *nolo contendere* plea cases where it is applicable.

Because petitioner agreed with the statement of facts proffered by the government, which established all the elements of attempted murder, his plea of guilty "contain[ed] a stipulation that specifically establishe[d] a more serious offense than the offense of conviction." Sentencing Guideline 1B1.2. It was therefore proper for the district court to sentence him under Guideline 2A2.1, the Guideline applicable to the offense of attempted murder.

If petitioner were subject to sentencing as if he had committed only an aggravated assault, the sentence would not reflect the conduct that both parties agreed occurred in this case. In that event, in order to reach an appropriate sentence within the Guidelines, the government would have to pursue the attempted murder charge and force scarce judicial resources to be devoted to trying a case in which the facts are undisputed. To require such a course would serve no value and would render guilty pleas a less useful way of resolving criminal cases.

In the alternative, the sentencing court could depart upward from the range of sentences indicated by the Guideline for aggravated assault. See *United States* v. *Strong*, 891 F.2d 82, 85 (5th Cir. 1989); *United States* v. *Garza*, 884 F.2d 181, 184 (5th Cir. 1989); *United States* v. *Guerrero*, 863 F.2d 245, 250 (2d Cir. 1988). The "reasonable" departure in that circumstance, see 18 U.S.C. 3742(e), would, of course, be that which would approximate the sentence that would have applied if the defendant had been convicted for the real offense (subject, of course, to the statutory maximum sentence for the offense of conviction). See *United States* v. *Perez*, 915 F.2d 947, 949 (5th Cir. 1990); *United States* v. *Zamarripa*, 905 F.2d 337, 342 (10th Cir. 1990); *United States* v. *Kim*, 896 F.2d 678, 684-685 (2d Cir. 1990).

The departure route would bring the court to the same sentence, but it would involve an unnecessarily

circuitous journey to that end. The Application Note to Guideline 1B1.2 indicates that the proviso was designed to avoid just such a pointless exercise. Because the parties agreed on the facts that specifically established all the elements of attempted murder, the Sentencing Guidelines authorized the district court to apply the Guideline for attempted murder and to impose the sentence it did without the need for a trial on the attempted murder charge and without the need for a departure from the applicable Guidelines range.[8]

2. Petitioner argues that the term "stipulation" in Guideline 1B1.2 should be read restrictively in several respects. None of petitioner's proposed limitations on the meaning of that term is supported by the language of the Guidelines or the policies the Guidelines were designed to promote.

a. Petitioner's principal submission is that a "stipulation" within the meaning of Guideline 1B1.2 must be embodied in a plea bargain agreement. See Pet. Br. 10, 17-21, 23. His main textual basis for that argument is the use of the word "containing" in the proviso to Guideline 1B1.2 ("in the case of a

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[8] The district court stated that if it was incorrect in its calculation of petitioner's Guidelines sentencing range, it would depart upward and impose the same sentence. We believe that the district court's sentence can be sustained on that ground if this Court disagrees with our submission here. Because the court of appeals did not address the departure issue, however, we believe that if the Court reverses on the "stipulation" issue, it should remand the case to the court of appeals for further consideration of the sentence, including the question whether the district court was correct in concluding that a departure would be appropriate in this case.

plea of guilty or *nolo contendere* containing a stipulation that specifically establishes a more serious offense than the offense of conviction"). The proviso, however, does not refer to a "plea bargain," or a "plea agreement." Instead, the word "containing" modifies the term "plea." While the phrasing of that proviso may not be ideal,[9] it is clear enough that the effect of the term "containing" is simply to require that the stipulation be made in connection with the plea of guilty or *nolo contendere*, rather than at some other time, such as at sentencing.[10]

Petitioner also seeks some support from the use of the term "specifically" in Guideline 1B1.2 ("a stipulation that *specifically* establishes a more serious offense than the offense of conviction"). The use of that term, however, merely indicates that the agreement must be intended to establish the defendant's actual conduct, rather than to serve some other purpose; it does not support petitioner's claim

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[9] The Sentencing Commission has recently requested comments as to whether Guideline 1B1.2 should be amended to provide expressly that such a stipulation must be part of a formal plea agreement. 56 Fed. Reg. 1891 (1991).

[10] The decision in *United States* v. *Guerrero*, 863 F.2d 245 (2d Cir. 1988), illustrates that distinction. In that case, the defendant entered a stipulation of facts after the plea proceedings to aid in the sentencing decision. The stipulation was not entered in connection with the plea proceedings. For that reason, the court held that the stipulated facts could be used only to determine the relevant conduct under Guideline 1B1.3 for the offense of conviction, and could not be used to support the court's selection of a different offense Guideline pursuant to Guideline 1B1.2. 863 F.2d at 248.

that a stipulation must be the product of a negotiated plea bargain.

To require that the stipulation be part of a plea bargain agreement would defeat the primary goal of the Sentencing Reform Act by creating "unwarranted disparities among defendants with similar records who have been found guilty of similar conduct." 28 U.S.C. 991(b)(1)(B). For example, if petitioner's tacit understanding with the prosecutor, J.A. 13, had been memorialized in a formal plea bargain, the applicability of the attempted murder Guideline would be beyond dispute. Under petitioner's restrictive definition of "stipulation," differences among sentences for two otherwise similarly situated defendants would depend on insignificant procedural differences in their plea proceedings rather than substantive differences in their criminal conduct. See *United States* v. *Strong*, 891 F.2d at 85 ("In any event, the same sentencing result is appropriate whenever the actual conduct of the defendant is more serious than that reflected by the guideline result.").

As this case illustrates, not all guilty or *nolo contendere* pleas are the product of bargained agreements. In fact, it is in cases in which the government's case is especially strong and the material facts not subject to dispute that a plea of guilty is most likely not to be the product of a bargained agreement. In that setting, the defendant may, as in this case, plead guilty to a lesser offense in the hope that the government will dismiss charges on the greater offense, but without a formal commitment from the government. If the government is satisfied with the sentence on the lesser charge, the defendant obtains the benefit of a lower maximum statutory penalty—not a major victory, perhaps, but a factor

of some value to a party with very little bargaining power. In this case, for example, the defendant obtained a maximum statutory penalty of 10 years' imprisonment by pleading guilty to assault, rather than the 20 years' imprisonment he could have faced if he had been convicted of attempted murder. See 18 U.S.C. 111, 1114.

While the defendant in a case such as this one may obtain the benefit of a lower maximum statutory penalty by pleading guilty to a lesser charge and inducing the government not to pursue the greater charge, there is no reason to apply the Sentencing Guidelines as if the true facts of the case were restricted to the offense of conviction. Where the defendant agrees to facts that establish all the elements of the greater offense, there is no reason not to apply the Guideline that most accurately reflects the defendant's true conduct. It would not further the policies of the Sentencing Guidelines or the Sentencing Reform Act to impose sentence based on a defendant's actual conduct only if his agreement to the elements of that offense is in writing or is embodied in a plea bargain agreement.

In response to these arguments from the language and the policies of the Guidelines, petitioner answers with references to a congressional report, a law review article, and a policy statement found in a separate chapter of the Sentencing Guidelines.

First, petitioner refers to a House of Representatives report that is cited in the commentary to Guideline 1B1.2. He contends that the citation of that report supports his view that a "stipulation" within the meaning of that Guideline must be part of a plea agreement. Pet. 22-23 (citing H.R. Rep. No. 1017, 98th Cong., 2d Sess. 99 (1984)).

The report in question discusses the concept of stipulations to greater offenses in a manner that is generally supportive of petitioner's position. Significantly, however, the House bill to which the report pertains was not enacted. Rather, Congress passed the Senate bill, which was quite different from the House version. See *Mistretta* v. *United States*, 488 U.S. 361, 366 n.3 (1989). In particular, the House bill required the Guidelines to employ the offense of conviction rather than the real offense, except where the real offense conduct was stipulated as a part of the plea agreement. See proposed 18 U.S.C. 3792 (a)(1), as set forth in H.R. Rep. No. 1017, *supra*, at 190; proposed 18 U.S.C. 3525(c)(1), as set forth in H.R. Rep. No. 1017, *supra*, at 175; H.R. Rep. No. 1017, *supra*, at 97-99. Under the House bill, any other information regarding the real offense could be considered as grounds for departure, but could not be used to calculate the offense level. See proposed 18 U.S.C. 3525(b)(5) as set forth in H.R. Rep. No. 1017, *supra*, at 175. By contrast, the Senate bill, which was enacted, requires the Sentencing Commission and the sentencing judge to consider the nature and circumstances of the offense in determining the appropriate sentence: the enacted bill does not specify when or whether real offense conduct should be covered directly in Guidelines or only as bases for departures from the Guidelines. See 28 U.S.C. 994 (c)(2); 18 U.S.C. 3553(a). The language from the House report on which petitioner relies therefore has no bearing on the proper construction of the statute that was enacted or the Guidelines that were promulgated under the authority of that statute.

The citation of the House report in the commentary to Guideline 1B1.2 obviously was not intended

to adopt by implication the entire approach of the rejected House bill; instead, the reference appears to have been intended simply to illustrate how the Guideline would apply to a "greater offense" stipulation that is part of a plea agreement. Nothing in the citation to the House report, or in the commentary generally, suggests that a stipulation *must* be part of a plea agreement.

As further support for his contention that a "stipulation" under Guideline 1B1.2 must be part of a negotiated plea agreement, petitioner relies on an excerpt from a law review article written by the Chairman and the General Counsel of the Sentencing Commission. In the article, they state:

> The purpose of this exception [the proviso to Guideline 1B1.2] is to achieve a closer conformity between the charged offense and the real offense conduct in those limited situations in which a defendant admits to conduct that satisfies the elements of a more serious offense than the offense to which he pleads. It is not enough that the defendant simply admit at sentencing to more serious criminal activity than the charged offense proscribes; rather, a negotiated quid pro quo as part of a plea of guilty or nolo contendere is contemplated.

Wilkins & Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C.L. Rev. 495, 501 (1990) (footnotes omitted). That excerpt cannot fairly be read to mean that an agreement is not a "stipulation," within the meaning of Guideline 1B1.2, unless it was a "negotiated quid pro quo." In their discussion, the authors refer to two polar situations: an admission at a sentencing hearing, which is not a stipulation in connection with

a plea of guilty,[11] and a plea bargain with a negotiated stipulation. Given the high incidence of negotiated guilty pleas, the proviso to Guideline 1B1.2 will ordinarily operate in the realm of plea bargains. It is therefore natural that the authors would refer to that case as the typical example of what is contemplated by a stipulation under Guideline 1B1.2. The authors' description of how the proviso operates in the typical case, however, should not be read as limiting stipulations to plea bargains that involve prosecutorial concessions and not making provision for the occasional case in which a guilty plea is entered without any bargained concession from the government.

Finally, petitioner cites the policy statement in Section 6B1.4 of the Sentencing Guidelines for the proposition that the Sentencing Commission contemplated the use of stipulations "only as part of a negotiated plea agreement." Pet. Br. 18. The purpose of that policy statement, however, is to prevent the parties to a plea bargain from stipulating to "misleading or non-existent facts" in order to achieve a sentence inconsistent with the Guidelines. Guideline 6B1.4, comment. Because the policy statement concerns plea bargaining, it simply does not speak to whether stipulations may be entered outside the context of a plea bargain; it certainly does not suggest that an agreement entered into outside the context of a plea bargain cannot qualify as a "stipulation" within the meaning of Guideline 1B1.2.

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[11] To illustrate this situation, the authors cite a case, *United States* v. *Guerrero*, 863 F.2d 245 (2d Cir. 1988), rejecting a stipulation entered into at the sentencing hearing. 41 S.C.L. Rev. at 504 n.41; see note 10, *supra* (discussing *Guerrero*).

b. Petitioner next relies on the same policy statement in Section 6B1.4 of the Guidelines as support for the second of his proposed limitations on the term "stipulation" in Guideline 1B1.2—that an agreement does not qualify as a stipulation unless it is in writing. See Pet. Br. 18; see also Pet. 9-10. Section 6B1.4(a) provides that "[a] plea agreement may be accompanied by a written stipulation of facts relevant to sentencing." The policy statement, however, is permissive; no rule requires stipulations to be in writing in plea bargains or elsewhere. The fact that Section 6B1.4 expressly refers to written stipulations, while Guideline 1B1.2(a) does not contain any express requirement that stipulations be in writing, suggests that the Sentencing Commission was reluctant to foreswear the use of oral stipulations and chose instead to leave the formality of stipulations to local rule. See Guidelines § 6B1.4(c) p.s.; cf. *Rodriguez* v. *United States*, 480 U.S. 522, 525 (1987) (per curiam) (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (use of a term in one part of a statute but not in another suggests that the omission was deliberate).[12]

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[12] It would make little sense for the Sentencing Commission to bar the court from using at sentencing facts to which the parties agree simply because the agreement was not reduced to writing. Courts have frequently treated informal agreements between counsel on the record as stipulations, even when court rules have required that such matters should be stipulated in writing. See, *e.g.*, *Moody* v. *Pepsi-Cola Metropolitan Bottling Co., Inc.*, 915 F.2d 201, 206 (6th Cir. 1990); *United States* v. *Fisher*, 912 F.2d 728, 732 (4th Cir. 1990); *United States* v. *Alvarado Garcia*, 781 F.2d 422, 427 (5th Cir. 1986); *Twohy* v. *First Nat'l Bank*, 758 F.2d 1185, 1189-1190 (7th Cir. 1985).

c. As the last of his proposed limitations on the meaning of the term "stipulation" in Guideline 1B1.2, petitioner suggests that a stipulation must be an agreement to an offense, not simply an agreement to facts that establish the elements of an offense. Pet. Br. 19-20. Guideline 1B1.2, however, does not by its terms require an explicit agreement that a particular offense has been committed; instead, it gives effect to stipulations that "establish" such an offense, a clear indication that a factual stipulation would be sufficient. Moreover, Application Note 1 to Guideline 1B1.2 discusses the application of the proviso to a stipulation that "establishes *facts*" and "admits the *elements*" of an offense, contradicting the notion that the defendant must stipulate to an offense *eo nomine*. Not surprisingly, in light of the language of the Guideline and the Application Note, the courts of appeals have understood the proviso to apply to purely factual stipulations. See, *e.g.*, *United States* v. *Bos*, 917 F.2d 1178, 1180-1181 (9th Cir. 1990); *United States* v. *Perez*, 915 F.2d 947, 949 n.3 (5th Cir. 1990); *United States* v. *Pologruto*, 914 F.2d 67, 69 (5th Cir. 1990); *United States* v. *Beard*, 913 F.2d 193, 198 (5th Cir. 1990); *United States* v. *White*, 912 F.2d 754, 755-756 (5th Cir. 1990); *United States* v. *Collar*, 904 F.2d 441, 442 (8th Cir. 1990); *United States* v. *Roberts*, 898 F.2d 1465, 1466-1467, 1469 (10th Cir. 1990); *United States* v. *Martin*, 893 F.2d 73, 75 (5th Cir. 1990); *United States* v. *Garza*, 884 F.2d at 183-184.

In sum, while petitioner suggests several possible restrictive interpretations of the term "stipulation," none of them finds convincing support in the language, structure, or purposes of Guideline 1B1.2. In particular, petitioner offers nothing to rebut the ordinary understanding of a "stipulation" as an "agreement," and he fails to show how his restrictive definition would adequately serve the purpose of the proviso to Guideline 1B1.2, which is to ensure that, in cases disposed of by pleas of guilty or *nolo contendere*, the court will engage in "real offense" sentencing if the parties can agree on the defendant's "real" criminal conduct.

C. Defining "Stipulation" To Mean "Agreement" For Purposes Of Guideline 1B1.2 Will Not Result In Unfairness To Defendants

Contrary to petitioner's suggestion, there is nothing novel or unfair about allowing a district court to sentence a defendant who enters a guilty plea based on his actual conduct. To begin with, such a defendant is in no worse position than his counterpart before the adoption of the Sentencing Guidelines. Under traditional sentencing practice, a defendant knew the minimum and maximum sentences permitted by statute, and little more. As we noted above, a sentencing court under the traditional system could, and often would, take into account the defendant's actual conduct in imposing a sentence within the statutory limits, and that practice has never been held to be unfair or unlawful. See *McMillan* v. *Pennsylvania*, 477 U.S. at 92; pp. 12-13 & note 5, *supra*.

There is likewise no unfairness in subjecting a defendant under the Sentencing Guidelines to a sentence based on conduct that he has admitted committing, even if he pleads guilty to a less serious offense. With the adoption of the Sentencing Guidelines, a defendant has a better idea of the range of sentences to which he is exposed, and if he wishes to avoid having a base offense level greater than the offense level of the crime to which he pleads guilty, he may simply

refrain from agreeing that he has engaged in conduct that constitutes a greater offense. Of course, if the defendant takes that approach, the government may charge him with the greater offense and pursue that charge, or attempt to prove that conduct at the sentencing hearing so that the court may depart upward from the Guidelines range in sentencing. Moreover, by adamantly refusing to acknowledge the full range of his criminal conduct, the defendant may forfeit the opportunity of receiving credit for acceptance of responsibility under Guideline 3E1.1, which can result in a reduction of approximately 20 to 30 percent of the defendant's sentence. Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 29 (1988). Accordingly, a defendant who refuses to acknowledge his conduct is likely to be no better off (and may be significantly worse off) than the defendant who is forthcoming, even though the forthcoming defendant may be subject to sentencing under a Guideline that is harsher than the one for the offense of conviction. Regardless of which course he chooses, however, the well-counseled defendant will know what he faces.

To be sure, some uncertainty regarding a defendant's potential sentence is inevitable, because Guidelines sentencing ranges are only presumptive. In petioner's case, for example, the district court could still depart upward, as petitioner's counsel acknowledged that it could, J.A. 22, 45, 64. In recognition of the inevitable uncertainty even under the Sentencing Guidelines, Federal Rule of Criminal Procedure 11 (c)(1) was amended in 1989 to require advice to the defendant that the court "may depart from those guidelines under some circumstances." The Advisory Committee's Note observes that "[n]o advice is likely

to serve as a complete protection against post-plea claims of ignorance or confusion." With that advice, and with a proper recognition of the risks and advantages that inhere in entering agreements with regard to the conduct at issue in the case, a defendant can make an even more informed judgment about whether to enter a plea of guilty than he could have done before the Sentencing Guidelines. The disposition of the question presented in this case will not make that judgment any less informed; it will simply avoid the creation of formalistic distinctions between some agreements that are deemed "stipulations" for purposes of Guideline 1B1.2 and some that are not.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

THOMAS BRAXTON,
Petitioner,

v.

UNITED STATES,
Respondent.

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

No. 90-5358

THOMAS BRAXTON,
Petitioner,
v.
UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

ARGUMENT

I. MR. BRAXTON DID NOT AGREE TO FACTS THAT SPECIFICALLY ESTABLISH THE MORE SERIOUS OFFENSE OF ATTEMPTED MURDER

The government recognizes that a "stipulation" is commonly understood as referring to "an agreement between attorneys." Brief for United States at 15. Lacking any indication on the record of an agreement between the attorneys in this case, the government attempts to transform Mr. Braxton's qualified acknowledgment of the government's factual proffer into an agreement between the parties. Thus, the government's brief is replete with

such statements as: Mr. Braxton "agree[d] to" the government's proffer (Brief for United States at 21), and suggests that there was "an agreement entered into" with respect to the government's proffer. *Id.* at 24.

The Court should not be led astray by these references. Subject to one crucial qualification, Mr. Braxton acknowledged the truth of the government's factual proffer in support of the guilty pleas to assault on deputy marshals (count two) and use of a handgun (count three). Although he acknowledged those facts, the suggestion that there was an "agreement entered into" is simply not true. The record discloses no agreement of any kind either between attorneys or between parties, and both lower courts found that there was no plea agreement in this case. J.A. 77, 95. The district court found in addition that "there's been no stipulation to Attempted Murder, and the record's clear on that." J.A. 77.

If Mr. Braxton was going to agree to anything, it was that he did not attempt to kill the marshals, for during the Rule 11 hearing, defense counsel emphasized that Mr. Braxton did not admit to the offense of attempted murder. J.A. 22. Indeed, even the prosecutor observed during the sentencing hearing that Mr. Braxton "continues to maintain he never intended to hurt anyone or kill anyone; he merely wanted them to go away." J.A. 62. Braxton himself specifically stated that he "was not trying to kill the marshals, harm the marshals." J.A. 76.

The government seeks to avoid the record on lack of intent by asserting that "callous and wanton disregard of the consequences to the marshals' lives" suffices to establish the requisite mental state for attempted murder. Brief for United States at 14 n.7. This assertion is meritless.[1]

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[1] The government's sole support for its claim that recklessness establishes the mental state required by 18 U.S.C. section 1114 is a Fifth Circuit decision interpreting a different statute. *United States v. Shaw*, 701 F.2d 367, 392-394 n.20 (5th Cir. 1981), *cert. denied*, 465 U.S. 1067 (1984). *Shaw* deals with a prosecution under 18 U.S.C. section 1113, not section 1114.

Congress rejected the position now taken by the government when it enacted the attempt provision of 18 U.S.C. section 1114. Although the terms of the statute do not specify the requisite mental state,[2] its legislative history clearly establishes that the offense of attempted murder includes the element of specific intent to kill. Congress added the attempt provision to section 1114 of title 18 in 1984.[3] The Senate Report accompanying the amendment explains that "[t]o constitute an attempt under this section, *the defendant must engage in conduct with the intention of killing the victim* and the conduct must constitute a substantial step toward the killing." S. Rep. No. 225, 98th Cong., 2d Sess. 328 (1983), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3504 (emphasis supplied). This language plainly refutes the government's assertion that recklessness is a sufficient mental state under 18 U.S.C. section 1114.[4]

[2] The indictment failed to allege the degree of attempted murder or the mental state necessary for the offense. J.A. 2.

[3] Comprehensive Crime Control Act of 1984, P.L. 98-473, 98 Stat. 2142. The amendment inserted "or attempts to kill" after "kills" in 18 U.S.C. section 1114 and set forth a maximum term of imprisonment of twenty years under the statute for any person found guilty of attempted murder.

[4] Even if proof of recklessness were sufficient for a conviction of attempted murder, the facts proffered at the Rule 11 hearing in support of Mr. Braxton's plea to assault on federal officers still fall short of conclusively establishing the mental state for attempted murder. At most, the proffer set forth facts which, if proved, would permit—but would not require—a trier of fact to draw an inference regarding Mr. Braxton's mental state at the time of the crime. The need for the trier of fact to make an assumption regarding Mr. Braxton's mental state to establish a necessary ingredient of the more serious offense of attempted murder negates the government's claim that the factual proffer "specifically established all the elements of attempted murder." Brief for United States at 18.

The factual proffer offered in support of the guilty plea to assault fails to establish that Mr. Braxton intended to kill the marshals, and the government has not asserted otherwise. As explained *supra* at page two, Mr. Braxton has consistently maintained that he lacked the requisite mental state for the crime of attempted murder.

If Mr. Braxton had been tried for attempted murder before being sentenced for it, he could well have presented a defense based on the element of intent—without contesting any of the facts proffered by the government during the Rule 11 hearing. The government's proffer that Mr. Braxton fired shots and shouted threats to kill the officers is perfectly consistent with his explanation that he intended only to frighten the marshals and not to harm them.[5]

One could, of course, choose to discount Mr. Braxton's explanation of his own state of mind and infer the required intent to kill from the facts he acknowledged as true. The dispositive point, though, is that the element of intent can be satisfied only by drawing inferences from part of the record and discrediting the rest. It twists the term "stipulation" beyond recognition to apply it to a construction of inferences that directly contradicts the defendant's express denials made to qualify the government's proffer. *See Rice v. Glad Hands, Inc.*, 750 F.2d 434, 438 (5th Cir. 1985) (a stipulation requires mutual assent and binds parties only to terms actually agreed upon).

Because the factual proffer does not conclusively establish attempted murder, the policy argument that Mr. Braxton should be sentenced for his "real conduct" based on his acknowledgment of the proffer has no bearing on this case. As the government concedes, the Sentencing

[5] Contrary to the government's assertion (Brief for United States at 14), Mr. Braxton never said that he was trying to kill the marshals. He said that he fired the handgun because he did not want to return to Saint Elizabeths Hospital. J.A. 18.

Commission rejected a real offense system for many sound reasons, including the lack of any "way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process." Brief for United States at 13 & n.6, quoting United States Sentencing Commission, *Guidelines Manual*, Ch. 1, Pt. A, ¶ 4(a), at 1.4-1.5 (1990). The Commission concluded that a pure or modified real offense system "threatened to work considerable unfairness." *Guidelines Manual*, Ch. 1, Pt. A, ¶ 4 (a) at 1.5.[6] The stipulation provision contained in section 1B1.2 was designed as a narrow exception to the Sentencing Commission's adoption of a charge offense system in which the applicable guideline is based on the offense of conviction. In the absence of a defendant's stipulation to conduct that satisfies all of the elements of a more serious offense than the offense of conviction, the general rule that the offense level is based on the offense of conviction applies.

II. THE GOVERNMENT'S BROAD CONSTRUCTION OF THE TERM "STIPULATION" CONFLICTS WITH THE INTENT OF CONGRESS AND THE SENTENCING COMMISSION

The government's proposed construction of the term "stipulation" also conflicts with the intent of the Sentencing Commission. The government argues that this Court should ignore the Sentencing Commission's express reliance on a portion of the House of Representatives Report which indicates that facts establishing guilt of a more serious offense may be considered only "if stipulated as part of a plea agreement." H. Rep. No. 1017,

[6] *Cf.* Schulhofer, *Due Process of Sentencing*, 128 U. Pa. L. Rev. 733, 772 (1980) (real offense system would be unsound and would distort the criminal justice system because of problems of fairness, procedural efficiency, and the impact on plea negotiations); Am. Bar Ass'n, Standards for Criminal Justice, Std. 18-3.1, Commentary at 214-217 (2d ed. 1980) (generally rejecting real offense sentencing guidelines).

98th Cong., 2d Sess. 99 (1984). Because the Senate bill was enacted, the government contends that the House Report is irrelevant. Brief for United States at 22. The history of the Sentencing Reform Act refutes this contention.

Congress did enact the Senate bill, not the House bill, on sentencing reform. Nevertheless, as this Court has already recognized, the House Report "reveals that the Senate's rationale underlying sentencing reform was shared in the House." *Mistretta v. United States*, 488 U.S. 361, 366 n.3 (1989). Furthermore, Congress left the Commission discretion to resolve the issue presented by this case. The Commission resolved the issue by adopting the view set forth in the House Report. As the Commission explained:

> Where a stipulation as part of a plea of guilty or *nolo contendere* specifically establishes facts that prove a more serious offense or offenses than the offense or offenses of conviction, the court is to apply the guideline most applicable to the more serious offense or offenses established. * * * For example, if the defendant pleads guilty to theft, but admits the elements of robbery as part of the plea agreement, the robbery guideline is to be applied. The sentence, however, may not exceed the maximum sentence for theft. *See* H. Rep. 98-1017, 98th Cong., 2d Sess. 99 (1984).

U.S.S.G. section 1B1.2, comment. (n.1).[7] By employing the language of the House Report, and citing directly to the Report, the Sentencing Commission expressly adopted this portion of the House Report. Moreover, according to the chairman and the general counsel of the Sentencing Commission, the stipulation provision in section 1B1.2 adopts the position in the House Report. Wilkins & Steer,

[7] This comment, like others, was officially promulgated for the express purpose of guiding interpretation of the sentencing guidelines. U.S.S.G. section 1B1.7, comment.

Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C.L. Rev. 495, 501 (1990).[8] Thus, the history of section 1B1.2 indicates that its reach should be limited to cases in which a defendant admits the elements of the more serious offense as part of a plea agreement.[9]

III. THE GOVERNMENT PROPOSES UNWORKABLE PROCEDURES THAT A DEFENDANT MUST FOLLOW TO AVOID ENTERING INTO A STIPULATION

The government's broad construction of the term "stipulation" would force a defendant to employ drastic and impractical procedures to avoid entering into a stipulation. The government insists that a defendant who wishes to avoid the effect of a stipulation to a more serious offense must effectively deny *all* unlawful conduct. Brief for United States at 27-28. The government's brief offers no authority applying its view.

The most telling aspect of the government's brief is that it omits any discussion of Mr. Braxton's express refusal to enter into a stipulation to attempted murder. At the Rule 11 hearing, Mr. Braxton's counsel explained that Braxton "admits he assaulted someone and used a handgun, but, obviously, is not admitting he attempted to specifically murder anyone." J.A. 22. Mr. Braxton objected to the presentence report on the basis that he had not stipulated to attempted murder (J.A. 43-44),

[8] The Commission recently proposed a clarifying amendment to section 1B1.2 which would state expressly that a stipulation to a more serious offense must be part of a formal plea agreement. 56 Fed. Reg. 1891 (Jan. 17, 1990).

[9] The government concedes that the wording of section 1B1.2 "may not be ideal." Brief for United States at 19. Limiting the reach of guideline section 1B1.2 to cases involving negotiated plea agreements would comport with the rule of lenity—that criminal sentencing provisions are to be construed in favor of the accused. *Bifulco v. United States*, 447 U.S. 381, 387 (1980); *Simpson v. United States*, 435 U.S. 6, 14-15 (1978).

and emphatically stated at sentencing that he was not trying to harm the marshals. J.A. 76. Not satisfied with these efforts, the government would require a defendant to deny all criminal conduct in order to ensure that he has not stipulated to a more serious offense under guideline section 1B1.2.

The Sentencing Commission clearly did not intend to delegate to prosecutors alone the discretion to decide whether and when a stipulation has been made.[10] Yet this would be the effect of the government's broad construction of "stipulation," which renders irrelevant Mr. Braxton's express refusals to admit attempted murder (J.A. 22 & 76), his objections to the presentence report (J.A. 43-44), and the district court's finding that "there's been no stipulation to Attempted Murder, and the record's clear on that." J.A. 77.

The government's proposal would fundamentally reshape the process of guilty pleas. The government suggests that Mr. Braxton could have avoided a stipulation to attempted murder by denying the factual proffer made by the prosecutor in support of his guilty plea to assault on federal officers and use of a handgun. The denial the government demands would be equivalent to a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). *Alford* pleas involve more complex procedures than ordinary guilty pleas and they are not generally favored. *United States v. Punch*, 709 F.2d 889, 895 n.12 (5th Cir. 1983); Fed. R. Crim. P. 11 advisory committee's note to 1974 amends.

Furthermore, as the government concedes, a defendant's blanket denial of criminal conduct would preclude a two-level decrease in the offense level for acceptance of responsibility under guideline section 3E1.1 for the

[10] There was no mention of a stipulation at the Rule 11 hearing. The dispute over the applicable guideline under section 1B1.2 first arose when the government argued to the probation office that Mr. Braxton had stipulated to a more serious offense. J.A. 31.

crime to which he pleads guilty. As a result, the defendant's sentencing range would be higher than if he had acknowledged his conduct. Under these circumstances, a defendant has nothing to gain by pleading guilty to any offense.

The government's proposal thus imputes to the Sentencing Commission an intent to impose heavy burdens on courts and draconian consequences on defendants who are prepared to plead guilty to one offense but are not willing to be punished without trial for another, more serious one. In contrast, the correct approach advanced by Mr. Braxton would allow the accused to plead guilty under normal procedures to those crimes he committed, and to acknowledge the behavior constituting those crimes, without risking enhanced punishment under the stipulation provision of section 1B1.2 for different crimes with essential elements that remain in dispute.

As Mr. Braxton explained in his opening brief, the Commission contemplated that in a case involving the stipulation rule of guideline section 1B1.2,

> the Government agrees to forego prosecution of a more serious charge in exchange for gaining application of the guideline applicable to the more serious charge. The defendant agrees to the use of that guideline in exchange for limiting his statutory exposure and, perhaps, avoiding other guideline and statutory consequences.

Wilkins & Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C.L. Rev. 495, 501 (1990) (citations omitted). When a stipulation results from a negotiated plea agreement, the defendant is punished for the more serious offense and receives a promise that the government will forego prosecution of that charge. He does so, however, knowingly and voluntarily with an awareness of the existence and effect of the stipulation.

Mr. Braxton elected to risk trial on attempted murder rather than stipulate to a base offense level higher than that applicable to assault on federal officers. Having expressly rejected a stipulation, Mr. Braxton should not now be forced to suffer its consequences. The unfairness of a system in which a defendant is subjected to enhanced punishment based on a stipulation found to exist in the absence of his consent cannot be tolerated. For all of the reasons stated above, this Court should hold that a section 1B1.2 stipulation to a more serious offense can only be made when the defendant admits the elements of the more serious offense as part of a plea agreement.

— CONCLUSION

For the foregoing reasons, and for the reasons set forth in Mr. Braxton's opening brief, the decision of the United States Court of Appeals for the Fourth Circuit should be reversed and the case should be remanded for resentencing in conformity with Sentencing Guideline section 1B1.2.

Respectfully submitted,

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